Supreme Court, U.S.
FILED
06-38 JUL 6 - 2006
OFFICE OF THE CLERK

No. 06-

IN THE

# Supreme Court of the United States

Detroit Entertainment, L.L.C.,
d/b/a MotorCity Casino, and
Marlene Brown,

*Petitioners*,

v.

Stella Romanski.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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July 6, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

## QUESTIONS PRESENTED

Petitioners are a private casino and one of its security guards. A jury found that the guard arrested respondent, a guest of the casino, without probable cause. It awarded her compensatory and punitive damages under 42 U.S.C. 1983. The Sixth Circuit held, as a matter of law, that petitioners' conduct constituted "state action" subjecting petitioners to liability under Section 1983. The court rested its decision on a provision of Michigan law authorizing a licensed private security guard with probable cause to arrest an individual on her employer's premises.

The Questions Presented are:

1. Has the Sixth Circuit fundamentally departed from this Court's state action jurisprudence, faithfully applied by other circuits, holding that private conduct that is contrary to state policy does not constitute "state action" for purposes of 42 U.S.C. 1983?

2. Did the Sixth Circuit err in holding, contrary to decisions of other circuits and the Michigan Supreme Court, that an arrest by a private party constitutes state action?

In the event the Court determines not to review the court of appeals' state action holding, the case presents a further question:

3. Should this case be held pending the disposition of No. 05-1256, *Philip Morris USA* v. *Williams*?

## PARTIES TO THE PROCEEDINGS BELOW

All the parties to the proceedings below are identified in the caption.

## RULE 29.6 STATEMENT

Petitioner Detroit Entertainment, L.L.C., is partially owned by Atwater Casino Group, L.L.C., which in turn is partially owned by Z.R.X., L.L.C., and IH Gaming, Inc., which in turn are partially owned by CCM Merger, Inc.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i
PARTIES TO THE PROCEEDINGS BELOW ..... ii
RULE 29.6 STATEMENT ..... ii
TABLE OF CONTENTS ..... iii
TABLE OF AUTHORITIES ..... iv
PETITION FOR A WRIT OF CERTIORARI ..... 1
OPINIONS BELOW ..... 1
JURISDICTION ..... 1
RELEVANT STATUTORY PROVISIONS ..... 1
STATEMENT ..... 1
REASONS FOR GRANTING THE WRIT ..... 9
I. The Sixth Circuit's State Action Jurisprudence Is Fundamentally Inconsistent With This Court's Precedents. ..... 9
II. Certiorari Is Warranted To Resolve The Circuit Split Regarding Whether An Individual Is A State Actor By Virtue Of Possessing Arrest Authority. ..... 19
A. The Lower Courts Are Divided Over Whether the State-Conferred Power To Arrest Transforms Private Security Guards Into State Actors. ..... 19
B. The Sixth Circuit's Decision Is Incorrect Under This Court's Precedents Governing State Action. ..... 24
III. The Punitive Damages Imposed By The Decision Below Violate Due Process. ..... 26
CONCLUSION ..... 29

## TABLE OF AUTHORITIES

### Cases

*American Manufacturers Mutual Insurance Co.* v. *Sullivan*, 526 U.S. 40 (1999) ..... 10, 11

*Argentine* v. *United Steel Workers of Am., AFL-CIO, CLC*, 287 F.3d 476 (CA6 2002) ..... 27

*Atkins* v. *Garcia Lab., Inc.*, 2005 WL 2173542 (E.D. Mich. Sept. 1, 2005) ..... 14

*Barbee* v. *Wal-Mart Stores, Inc.*, 2002 WL 1784318 (W.D. Tenn. July 16, 2002) ..... 14

*Benford* v. *Smith*, 2005 WL 1325003 (E.D. Tenn. June 3, 2005) ..... 14

*Black* v. *Barberton Citizens Hosp.*, 8 F. Supp. 2d 697 (N.D. Ohio 1998) ..... 14

*BMW of North America* v. *Gore*, 517 U.S. 559 (1996) ..... 27

*Boykin* v. *Van Buren Twp.*, 2006 WL 305751 (E.D. Mich. Feb. 9, 2006) ..... 14

*Brewster* v. *Cooper Indus.*, 2005 WL 2403734 (E.D. Ky. Sept. 28, 2005) ..... 14

*Canter* v. *Hardy*, 188 F. Supp. 2d 773 (E.D. Mich. 2002) ..... 14

*Carey* v. *Continental Airlines, Inc.*, 823 F.2d 1402 (CA10 1987) ..... 20

*Chapman* v. *The Higbee Co.*, 319 F.3d 825 (CA6 2003) ..... passim

*City of Grand Rapids* v. *Impens*, 327 N.W.2d 278 (Mich. 1982) ..... 8, 21, 24

*Cmtys. for Equity* v. *Michigan High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729 (W.D. Mich. 2000) ..... 14

*Collins* v. *Womancare*, 878 F.2d 1145 (CA9 1989) ..... 11, 17

*Collyer* v. *Darling*, 98 F.3d 211 (CA6 1996) ..... 13

*Commonwealth* v. *Corley*, 491 A.2d 829 (1985) ..... 22

*Dahlberg* v. *Becker*, 748 F.2d 85 (CA2 1984) ..... 11

*Daniels* v. *Retired Senior Volunteer Program*, 2006 WL 783438 (S.D. Ohio Mar. 27, 2006) ..... 14
*Dean* v. *Olibas*, 129 F.3d 1001 (CA8 1997) ..... 27
*Disorbo* v. *Hoy*, 343 F.3d 172 (CA2 2003) ..... 7
*Durso* v. *Kentucky Ass'n of Counties, Inc.*, 32 F. Supp. 2d 929 (E.D. Ky. 1999) ..... 14
*Eckmeyer* v. *Brimfield Twp. Bd. of Trs.*, 2006 WL 1644377 (N.D. Ohio June 12, 2006) ..... 14
*Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614 (1991) ..... 2, 10
*Ellison* v. *Garbarino*, 48 F.3d 192 (CA6 1995) ..... 5, 13
*Evans* v. *Newton*, 382 U.S. 296 (1966) ..... 25
*Farmer* v. *Pike County Agric. Soc'y*, 411 F. Supp. 2d 838 (2005) ..... 14, 14
*Federer* v. *Gephardt*, 363 F.3d 754 (CA8 2004) ..... 11
*Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978) ..... 6, 19, 25
*Friedrich* v. *Southeast Christian Church of Jefferson County*, 2005 WL 2333633 (W.D. Ky. Sept. 22, 2005) ..... 14
*Gallagher* v. *Neil Young Freedom Concert*, 49 F.3d 1442 (CA10 1995) ..... 20
*Gant* v. *Bowles*, 2005 WL 2994443 (M.D. Tenn. Nov. 3, 2005) ..... 14
*Gene Thompson Lumber Co.* v. *Davis Parmer Lumber Co.*, 984 F.2d 401 (CA11 1993) ..... 11
*Georgia* v. *McCollum*, 505 U.S. 42 (1992) ..... 10
*Gonzalez-Morales* v. *Hernandez-Arencibia*, 221 F.3d 45 (CA1 2000) ..... 11
*Graham* v. *Tennessee Secondary Sch. Athletic Ass'n*, 1995 WL 115890 (E.D. Tenn. Feb. 20, 1995) ..... 14
*Greco* v. *Guss*, 775 F.2d 161 (CA7 1985) ..... 11, 17
*Hayes* v. *Allstate Ins. Co.*, 95 F. Supp. 2d 832 (W.D. Tenn. 2000) ..... 14
*Holley* v. *Deal*, 948 F. Supp. 711 (M.D. Tenn. 1996) ..... 14

*Hood* v. *Commonwealth*, 448 S.W.2d 388 (Ky. 1969) ..... 21
*Hopson* v. *Wal-Mart*, 2006 WL 939004 (W.D. Ky. Apr. 10, 2006) ..... 14
*Howerton* v. *Gabica*, 708 F.2d 380 (CA9 1983) ..... 17
*Hubbard* v. *State*, 234 A.2d 775 (Md. App. 1967), cert. denied, 393 U.S. 889 (1968) ..... 22
*Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) ..... 25
*Johnson* v. *LaRabida Children's Hospital*, 372 F.3d 894 (CA7 2004) ..... 23
*Kelly* v. *Forest Hills Local Sch. Dist. Bd. of Educ.*, 19 F. Supp. 2d 797 (S.D. Ohio 1998) ..... 14
*Kennedy* v. *Bank One Corp.*, 2002 WL 31008340 (E.D. Mich. Aug. 15, 2002) ..... 14
*Kolinski* v. *Lubbers*, 712 F.2d 471 (CADC 1983) ..... 11
*Lansing* v. *City of Memphis*, 202 F.3d 821 (2000) ..... 13, 14
*Lee* v. *Edwards*, 101 F.3d 805 (CA2 1996) ..... 7
*Lintz* v. *Skipski*, 807 F. Supp. 1299 (W.D. Mich. 1992) ..... 14
*Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922 (1982) ..... passim
*Marsh* v. *Alabama*, 326 U.S. 501 (1946) ..... 25
*McCord* v. *City of Columbus*, 225 F. Supp. 2d 804 (S.D. Ohio 2002) ..... 14
*Monroe* v. *Pape*, 365 U.S. 167 (1961) ..... 2, 10, 17
*Nixon* v. *Condon*, 286 U.S. 73 (1932) ..... 25
*Oliver* v. *City of Memphis*, 2004 WL 3316242 (W.D. Tenn. Dec. 2, 2004) ..... 14
*Ouzts* v. *Maryland Nat'l Ins. Co.*, 505 F.2d 547 (1974) ..... 12
*Payton* v. *Rush-Presbyterian-St. Luke's Medical Center*, 184 F.3d 623 (CA7 1999) ..... 21, 22, 23
*Perdue* v. *Quorum Health Resources, Inc.*, 934 F. Supp. 919 (M.D. Tenn. 1996) ..... 14

*Piper* v. *R.J. Corman R.R. Group*, 2005 WL 1523566 (E.D. Ky. June 28, 2005) ..... 14
*R.R.* v. *Bd. of Educ. of Kingsport City*, 2006 WL 1211163 (E.D. Tenn. Apr. 28, 2006) ..... 14
*Roudybush* v. *Zabel*, 813 F.2d 173 (CA8 1987) ..... 9, 11
*Rudy* v. *Vill. of Sparta*, 990 F. Supp. 924 (W.D. Mich. 1996) ..... 14
*Saalman* v. *Reid*, 2006 WL 278412 (S.D. Ohio Feb. 3, 2006) ..... 14
*Sanders* v. *Prentice-Hall Corp. Sys., Inc.*, 969 F. Supp. 481 (W.D. Tenn. 1997) ..... 14
*Siskaninetz* v. *Wright State Univ.*, 175 F. Supp. 2d 1018 (S.D. Ohio 2001) ..... 14
*Smith* v. *Detroit Entm't LLC*, 338 F. Supp. 2d 775 (E.D. Mich. 2004) ..... 14
*State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003) ..... 27, 28
*State* v. *Kemp*, 205 So. 2d 411 (La. 1968) ..... 21
*Tahfs* v. *Proctor*, 316 F.3d 584 (CA6 2003) ..... 13, 14
*Terry* v. *Adams*, 345 U.S. 461 (1953) ..... 25
*Thompson* v. *City of Columbus*, 2001 WL 1681129 (S.D. Ohio Sept. 26, 2001) ..... 11, 14
*Wade* v. *Byles*, 83 F.3d 902 (CA7 1996) ..... 8, 20, 22
*Wal-Mart Stores, Inc.* v. *Goodman*, 789 So. 2d 166 (Ala. 2000) ..... 28
*White* v. *Scrivner Corp.*, 594 F.2d 140 (CA5 1979) ..... 20
*Wilcher* v. *City of Akron*, 2005 WL 3338378 (N.D. Ohio Dec. 8, 2005) ..... 14
*Williams* v. *Payne*, 73 F. Supp. 2d 785 (E.D. Mich. 1999) ..... 14
*Wittstock* v. *Mark A. Van Sile, Inc.*, 330 F.3d 899 (2003) ..... 13, 14
*Wolotsky* v. *Huhn*, 960 F.2d 1331 (CA6 1992) ..... passim
*Worrall* v. *Irwin*, 890 F. Supp. 696 (S.D. Ohio 1994) ..... 14

*Wyatt* v. *Cole*, 994 F.2d 1113 (CA5 1993) ..... 11
*Yanaki* v. *Biomed, Inc.*, 415 F.3d 1204 (CA10 2005) ..... 11
*Young* v. *City of Sandusky*, 2005 WL 1491219 (N.D. Ohio June 23, 2005) ..... 14

**Statutes**

28 U.S.C. 1254(1) ..... 1
42 U.S.C. 1983 ..... passim
Mich. Comp. Laws 338.1069(1) ..... 23
Mich. Comp. Laws 338.1079 ..... 7, 17
Mich. Comp. Laws 338.1080 ..... 5, 17, 23
Mich. Comp. Laws 764.15 ..... 17, 17
Michigan Gaming Control and Revenue Act (MGCRA) Rule 432.1212 ..... 5, 23

**Other Authorities**

David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165 (1999) ..... 25

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Detroit Entertainment L.L.C., d/b/a MotorCity Casino, and Marlene Brown respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-38a) is reported at 428 F.3d 629. The opinion of the district court (Pet. App. 39a-62a) is reported at 265 F. Supp. 2d 835.

## JURISDICTION

The judgment of the court of appeals was entered on October 28, 2005. The court denied a petition for rehearing and rehearing en banc on February 6, 2006. Pet. App. 63a-64a. Justice Stevens subsequently extended the time to file this petition to and including July 6, 2006. App. 05A961. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

## RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Appendix (at 65a-70a).

## STATEMENT

The lower courts in this case held as a matter of law that a private security guard authorized by state law to make an arrest engaged in "state action" for purposes of 42 U.S.C. 1983 when she arrested respondent without probable cause. That holding followed from settled circuit precedent that finds state action notwithstanding that respondent's claim is that the guard acted *contrary* to state policy, which permits arrest only with probable cause. The court of appeals also upheld an award of $600,000 in punitive damages to respondent on compensatory damages of less than $300.

1. 42 U.S.C. 1983 provides a cause of action against any person "who, under color of any statute, ordinance,

regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution."

Section 1983 liability for violation of the Fourth Amendment attaches only to "state actors." *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 924 (1982) (explaining that the Bill of Rights is incorporated as applying to the states by the Fourteenth Amendment, which requires state action). This requirement "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.* at 936-37. Conduct attributable to the state for purposes of the Fourteenth Amendment also is "under color of state law" for purposes of Section 1983. *Id.* at 935.

Conduct is "fairly attributable to the State" only if it satisfies two criteria:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. * * * Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

*Lugar*, 457 U.S. at 937.

The content of the first element depends on the nature of the defendant. For governmental employees with the apparent authority to undertake the challenged act, the first element is satisfied even if the defendant violates state policy. *Monroe* v. *Pape*, 365 U.S. 167 (1961).

For private defendants such as petitioners, by contrast, this "abuse of authority" doctrine does not apply. *Lugar*, 457 U.S. at 940. Rather, the elements of the "two-part" test "diverge when the constitutional claim is directed against * * * a private party." *Id.* at 937. In such cases, the first prong of the test requires that the private conduct be

authorized by state law or policy. Mere "private misuse of a state statute does not describe conduct that can be attributed to the State." *Id.* at 941. Thus, in *Lugar*, the plaintiff's Section 1983 suit alleged that the private defendant had seized the plaintiff's property through a misuse of state attachment procedures. This Court held that the defendant's conduct was not "state action" because "the conduct of which petitioner complained could not be ascribed to any governmental decision. * * * That respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision." *Id.* at 940.

2. Respondent Stella Romanski brought this suit against petitioners Detroit Entertainment, L.L.C. (a private Detroit casino), Marlene Brown (a casino security guard), and two other security guards. The gravamen of her complaint is that she was wrongfully arrested and detained when she visited the casino on August 7, 2001.

On the date in question, respondent traveled with two friends to the casino to gamble and eat lunch. During a break from playing slot machines, respondent found a five-cent token at an unoccupied machine and brought the token back to the machine that she had been playing earlier. One uniformed male security guard approached her and asked that she accompany him to the office. Petitioner Marlene Brown and two other female security guards – none of whom were uniformed – also approached respondent. After respondent became belligerent, the guards escorted her to the casino security office, where they told her that patrons were prohibited from "slot walking," or taking tokens from machines they had not been playing. This policy had not been posted at the casino. Brown then removed a nickel from respondent's earnings. After guards photographed respondent and photocopied her driver's license and social security card, she was excluded from the casino for six months.

The casino permitted respondent to use the restroom before leaving, accompanied by a security guard who waited

outside the stall, but not to return to the casino floor or eat lunch at the casino's buffet. Instead, the casino directed her to an air-conditioned valet area to wait for her bus. Respondent left the valet area when she mistakenly believed her bus had arrived, and ran into her friends outside. She remained outside in hot and humid weather until her friends persuaded her to reenter the casino. Given her exclusion, casino employees directed her back to the valet area, where she waited with her friends until their bus arrived.

At no time during respondent's detention was she handcuffed, touched, physically threatened, or told she could not leave. While respondent testified that she provided identification and agreed to be photographed because she believed the guards to be police officers, Marlene Brown stated (in testimony that is presumed to be true in the procedural posture of the case) that she showed respondent her casino badge and identified herself as a "security police officer." (Michigan law uses the name "private security police officer" to refer to licensed private guards.) As the dissent below summarized, "[T]he security guards neither threatened nor actually invoked the authority of the state during the incident." See Pet. App. 37a (Farris, J., dissenting) (footnote omitted).

Respondent's initial complaint – removed by petitioners to federal district court – claimed that her detention violated state law and constituted false arrest and imprisonment. The premise of those torts is that the defendants were without legal authority to restrain the plaintiff. See Pet. App. 57a.

Respondent subsequently amended her complaint to allege as well that her unlawful arrest violated Section 1983. Respondent's amended complaint did *not* allege that petitioners' conduct was pursuant to a state policy. To the contrary, as noted, the essence of her "false arrest" claim is that petitioners' conduct was contrary to the requirement that arrests be conducted only upon probable cause. But the omission of such an allegation was consistent with settled

Sixth Circuit case law, under which a Section 1983 suit against a private party need *not* allege that the defendant's conduct was pursuant to a state policy. See, *e.g.*, *Ellison* v. *Garbarino*, 48 F.3d 192, 195 (1995); *Wolotsky* v. *Huhn*, 960 F.2d 1331, 1334-35 (1992); see also *Chapman* v. *The Higbee Co.*, 319 F.3d 825, 833 (2003) (en banc) (ratifying this approach six months after respondent amended her complaint and three months before the district court ruled on the state action question).

Respondent accordingly simply alleged that petitioners' actions were under color of state law because Michigan law confers the power of arrest on petitioner Brown. A properly licensed private security police officer on his employer's premises "has the authority to arrest a person without a warrant" in circumstances that an actual police officer would be permitted to make such an arrest. Mich. Comp. Laws 338.1080. There are limits on that power, however. "Such authority is limited to his or her hours of employment as a private security police officer and does not extend beyond the boundaries of the property of the employer and while the private security police officer is in the full uniform of the employer." *Ibid.* Casino security guards are moreover prohibited from carrying firearms or other weapons on casino premises. Michigan Gaming Control and Revenue Act (MGCRA) Rule 432.1212.

3. Petitioners sought to dismiss respondent's Section 1983 claim on the ground that the casino and its employees were not state actors. The district court disagreed, holding that petitioners were state actors as a matter of law because petitioner Brown initiated respondent's detention while on duty as a licensed guard with the same arrest authority as a police officer. Pet. App. 47a-53a. The district court relied upon Sixth Circuit precedent holding that the conduct of private party deemed to be a "state actor" constitutes state action, without regard to whether the challenged conduct was in fact pursuant to a state policy. See *id.* 48a (citing *Chapman*, 319 F.3d at 833).

On this basis, and over petitioners' objections, the judge instructed the jury to find that petitioners had acted under color of law during the incident. The court instructed, "'Acting under color of law in this case simply means acting in one's capacity as a licensed security officer with powers to make an arrest on the casino premises.'" Pet App. 8a. The judge further instructed the jury that petitioners could be found liable for false arrest and violating respondent's Fourth Amendment rights only if petitioners lacked probable cause to detain respondent. *Id.* 20a.

The jury returned a verdict for respondent. It found that the casino had falsely arrested and falsely imprisoned respondent in violation of state law. In turn, it ruled for respondent on the ground that the casino had violated respondent's Fourth Amendment rights under color of state law. It awarded respondent compensatory damages of $279.05. Based solely upon the Section 1983 claim, the jury also awarded $875,000 in punitive damages against the casino and $500 in punitive damages against petitioner Brown.

4. Petitioners appealed the state action finding. Constrained by a line of settled precedent (including the *en banc* ruling in *Chapman*, *supra*), petitioners did not maintain that the district court's ruling was erroneous on the ground that their conduct was contrary to state policy. Rather, they made the only argument available to them under Sixth Circuit law: that they were not "state actors." The Sixth Circuit affirmed in a divided disposition.

The court of appeals first noted that this Court has expressly left open the question of when private security guards qualify as state actors on the theory that they are exercising powers traditionally reserved to the state, and that the issue has given rise to a "growing body of case law" in the lower courts. Pet. App. 10a (citing *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 163 (1978)).

The Sixth Circuit rested its decision on its settled circuit precedent holding that private conduct is fairly attributable to

the State, and is actionable under Section 1983, so long as the conduct satisfies any one of "three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, or (3) the symbiotic relationship or nexus test." Pet. App. 9a (internal quotation marks omitted) (citing *Chapman*, 319 F.3d 833). Applying the public function test in this case, the Sixth Circuit held that because "at all times relevant to this case," Brown had "the authority to make arrests at [her] discretion and for any offenses, she "was a state actor as a matter of law." *Id.* 13a (footnote omitted). The court afforded no weight to the facts that security guards possessed this arrest power only at limited times and places and that detention under the circumstances of this case was not solely a state prerogative at common law. The court explained that the relevant question was simply whether the casino guards possessed plenary arrest power at the time of respondent's detention. The court stated that it

> focused on the specific powers that Brown, in her capacity as an on-duty and licensed private security officer, had at her disposal. Because at least one of these powers, the plenary arrest power, is "traditionally the exclusive prerogative of the state," and because it is undisputed that Brown was in fact licensed under M.C.L. § 338.1079 and was in fact on duty at all times relevant to this case, the district court correctly held that Brown was a state actor as a matter of law.

*Id.* 17a (quoting *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)).

The Sixth Circuit also agreed that substantial punitive damages were warranted, but directed the district court to order a remittitur of $600,000 in punitive damages against Detroit Entertainment, L.L.C. (Respondent accepted the remittitur on remand.) The court described the 3135-to-1 ratio of punitive-to-compensatory damages below as

"unusually high," and noted that analogous cases elsewhere had found that seemingly more serious conduct could support only significantly smaller punitive awards. Pet. App. 25a, 28a (citing remittitur of $75,000 for malicious prosecution in *Lee* v. *Edwards*, 101 F.3d 805 (CA2 1996) and remittitur of $75,000 in *Disorbo* v. *Hoy*, 343 F.3d 172, 187 (CA2 2003), involving severe beating by police officer). It also held that petitioners did not have fair notice that a penalty as great as $875,000 could result from their conduct. Further, it noted that respondent did not suffer physical injury and there was no evidence the casino had engaged in similar detentions previously. Nevertheless, the court deemed $600,000 in punitive damages – 2150 times the amount of compensatory damages – appropriate because Detroit Entertainment is a wealthy business entity, respondent's injuries lacked ready monetary value, and the court deemed petitioners' treatment of respondent to be egregious and reprehensible. *Id.* 21a-34a.

5. Judge Farris dissented, reasoning that security guards' plenary arrest authority does not render them state actors. The dissent noted that respondent had "presented no evidence that the State of Michigan has traditionally and exclusively reserved the power to make warrantless arrests." Pet. App. 36a. To the contrary, citizens with arrest authority are not necessarily state actors when their authority is limited to particular times and places, and when the citizens at issue possess far narrower powers than police officers. Judge Farris found it noteworthy that the majority's state action holding conflicted with a decision of the Michigan Supreme Court, and that a contrary result also appeared warranted under Seventh Circuit jurisprudence. Pet. App. 34a n.7, 35a (Farris, J., dissenting) (citing *City of Grand Rapids* v. *Impens*, 327 N.W.2d 278 (Mich. 1982); *Wade* v. *Byles*, 83 F.3d 902, 904 (CA7 1996)).

After the Sixth Circuit denied rehearing and rehearing en banc, this petition followed.

## REASONS FOR GRANTING THE WRIT

### I. The Sixth Circuit's State Action Jurisprudence Is Fundamentally Inconsistent With This Court's Precedents.

The court of appeals rested its decision in this case on settled Sixth Circuit precedent holding that a private defendant engages in "state action" if any of the three tests for identifying a "state actor" is satisfied. The precedent writes out of existence the first element of the "state action" inquiry adopted by this Court. This Court's precedents dictate the conclusion that, because the very essence of respondent's suit is that the private petitioners in this case were acting in violation of state law when they arrested respondent without probable cause, petitioners' conduct was not pursuant to a state policy and does not constitute "state action."

1. Private conduct that causes the deprivation of a federal right constitutes actionable "state action" only if it is "fairly attributable to the State." See *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). As correctly described by one court of appeals, the "fair attribution test has two components: a state policy and a state actor." *Roudybush* v. *Zabel*, 813 F.2d 173, 176 (CA8 1987). The first component focuses on whether the challenged *conduct* was attributable to a state policy whereas the second component focuses on whether the *defendants* are fairly affiliated with the State.

Specifically, the "[f]irst" requirement is that "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be [i] because he is a state official, [ii] because he has acted together with or has obtained significant aid from state officials, or [iii] because his conduct is otherwise chargeable to the State." *Ibid.*

*Lugar* stressed that these two components, though related, are distinct in cases involving private defendants. The two "collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions," but "[t]he two principles diverge when the constitutional claim is directed against a party without such apparent authority, *i.e.*, against a private party." 457 U.S. at 937.

In *Lugar*, one of the debtor-plaintiff's claims was that the creditor-defendants had attached his property in violation of the state's prejudgment attachment statute. See 457 U.S. at 940. This Court held that the claim did not satisfy the state policy component of the "fair attribution" inquiry:

> Count two alleged that the deprivation of property resulted from respondents' "malicious, wanton, willful, opressive [sic], [and] unlawful acts." By "unlawful," petitioner apparently meant "unlawful under state law." To say this, however, is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State. Nor did they have the authority of state officials to put the weight of the State behind their private decision, *i.e.*, this case does not fall within the abuse of authority doctrine recognized in *Monroe* v. *Pape*, [365 U.S. 167 (1961)]. That respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision. Count two, therefore, does not state a cause of action under § 1983 but challenges only private action.

*Lugar*, 457 U.S. at 940 (last alteration added).

This Court has repeatedly reiterated the distinct components of the state action inquiry. See, *e.g.*, *Georgia* v. *McCollum*, 505 U.S. 42, 50-51 (1992); *Edmonson* v. *Leesville*

*Concrete Co.*, 500 U.S. 614, 620 (1991). Thus, in *American Manufacturers Mutual Insurance Co.* v. *Sullivan*, 526 U.S. 40 (1999), this Court was confronted by an attempt to avoid the second component of the *Lugar* inquiry. This Court chastised the respondents for

> ignor[ing] our repeated insistence that state action requires *both* an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," *and* that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar*[, 457 U.S. at 937.]

*Sullivan*, 526 U.S. at 50 (emphasis in original).

Other circuits faithfully apply the principle that the private misuse of a state statute does not create state action for purposes of Section 1983. See generally *Wyatt* v. *Cole*, 994 F.2d 1113, 1117-18 (CA5 1993) (collecting cases). Those courts regularly reject claims for failure to satisfy the first element of the state action inquiry. *Yanaki* v. *Biomed, Inc.*, 415 F.3d 1204, 1207-10 & n.11 (CA10 2005); *Federer* v. *Gephardt*, 363 F.3d 754, 759 (CA8 2004); *Gonzalez-Morales* v. *Hernandez-Arencibia*, 221 F.3d 45, 49-51 (CA1 2000); *Gene Thompson Lumber Co.* v. *Davis Parmer Lumber Co.*, 984 F.2d 401, 403-04 (CA11 1993); *Collins* v. *Womancare*, 878 F.2d 1145, 1153 (CA9 1989); *Roudybush* v. *Zabel*, 813 F.2d 173, 176-78 (CA8 1987); *Greco* v. *Guss*, 775 F.2d 161, 165-66 (CA7 1985); *Dahlberg* v. *Becker*, 748 F.2d 85, 90-91 (CA2 1984); *Kolinski* v. *Lubbers*, 712 F.2d 471, 477-78 (CADC 1983).

Illustrative is the Ninth Circuit's holding that private parties are not amenable to suit under Section 1983 for exceeding their authority under a California citizen's arrest statute, relying expressly upon *Lugar*'s holding that private misuse of a state statute does not satisfy the state policy component of the "fair attribution" requirement. See

*Womancare*, 878 F.2d at 1150-53. *Womancare* emphasized that the Supreme Court "ha[d] made it clear * * * that [the] 'abuse of authority' doctrine does not apply if the challenged action is one undertaken by a *private party* rather than a state official." *Id.* at 1152 (citing *Lugar*, 457 U.S. at 940).[1]

2. By contrast, for over a decade, the Sixth Circuit has nonetheless consistently refused to apply the distinct first element of the state action inquiry in Section 1983 suits against private defendants. The Sixth Circuit instead consistently equates the second component of the state action inquiry with the ultimate question of whether private conduct is "fairly attributed" to the state, abrogating the required inquiry into whether the alleged deprivation of the plaintiff's rights was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937.

The Sixth Circuit's departure from *Lugar* began with *Wolotsky* v. *Huhn*, 960 F.2d 1331 (1992), which recited its understanding of the law as follows:

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[1] In a leading case pre-dating *Lugar*, the Ninth Circuit, sitting en banc, held that a private bail bondsman could not be sued under Section 1983 for arresting the plaintiff in violation of the relevant California laws governing bail bondsmen, concluding that the actions of private parties were "clearly not under the color of California law" when that law did not "authorize, permit, encourage or tolerate the conduct of the" bail bondsman. See *Ouzts* v. *Maryland Nat'l Ins. Co.*, 505 F.2d 547, 553-55 (1974) (en banc). Anticipating *Lugar*'s recognition that private parties do not "have the authority of state officials to put the weight of the State behind their private decision," *Lugar*, 457 U.S. at 940, *Ouzts* rejected the plaintiff's invocation of the "abuse of authority" doctrine, distinguishing cases in which the doctrine had been applied as cases in which "the offenders were either actual state officials * * * or they were jointly engaged in activity with actual state officials," 505 F.2d at 554.

> The principal inquiry in determining whether a private party's actions constitute "state action" under the Fourteenth Amendment is whether the party's actions may be "fairly attributable to the state." *See Lugar*[, 457 U.S. at 937]. The Supreme Court has set forth three tests to determine whether the challenged conduct may be fairly attributable to the state in order to hold the defendants liable under section 1983. These tests are: (1) the public function test; (2) the state compulsion test; and (3) the symbiotic relationship or nexus test.

960 F.2d at 1334-35 (citations omitted).

The three tests cited by the court in *Wolotsky* are, in fact, merely different formulations of the second component of the *Lugar* test. See *Lugar*, 457 U.S. at 938-39 (explaining that this Court has articulated several different formulations of the second component of the "fair attribution" inquiry, including all three tests listed in *Wolotsky*). In other words, these tests are directed at the question whether the defendants are fairly affiliated with the State, *not* at whether the challenged conduct is authorized by state law or policy. Thus, by equating the ultimate state action inquiry with these various tests, the Sixth Circuit in *Wolotsky* abrogated the distinct inquiry into whether the challenged conduct is authorized by state law or policy.

In the fourteen years since *Wolotsky*, an uninterrupted line of published Sixth Circuit precedent has applied the same rule. Soon after *Wolotsky*, the Sixth Circuit stated that it "recognize[d] three tests for determining whether private conduct is fairly attributable to the state: the public function test, the state compulsion test, and the nexus test." *Ellison* v. *Garbarino*, 48 F.3d 192, 195 (1995) (citing *Wolotsky*, 960 F.2d at 1335); see also *Wittstock* v. *Mark A. Van Sile, Inc.*, 330 F.3d 899, 902 (2003); *Tahfs* v. *Proctor*, 316 F.3d 584, 591 (2003); *Lansing* v. *City of Memphis*, 202 F.3d 821, 828 (2000); *Collyer* v. *Darling*, 98 F.3d 211, 231-32 (1996).

These decisions culminated in an en banc Sixth Circuit decision:

> A private party's actions constitute state action under section 1983 where those actions may be "fairly attributable to the state." *Lugar*[, 457 U.S. at [937]]. The Supreme Court has developed three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test.

*Chapman* v. *The Higbee Co.*, 319 F.3d 825, 833 (2003) (en banc) (citing *Wolotsky*, 960 F.2d at 1335). The en banc court in *Chapman* reversed the district court's grant of summary judgment for the defendants on the state action question and remanded for further proceedings simply because there were material issues of fact pertaining to the so-called nexus test, see 319 F.3d at 834-35, without any regard for whether the state policy component of *Lugar* had also been satisfied.[2] Relying upon the court of appeals' settled precedent, district courts within the Sixth Circuit similarly do not apply the first element of the state action inquiry.[3]

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[2] Three published Sixth Circuit decisions since *Wolotsky* acknowledge that *Lugar*'s "fair attribution" inquiry has two parts. But those decisions nonetheless explicitly state that the two elements are embodied in the three "tests" that are, in fact, the *second* element of the *Lugar* inquiry. See *Wittstock*, 330 F.3d at 902; *Tahfs*, 316 F.3d at 590-91; *Lansing*, 202 F.3d at 828.

[3] See *Eckmeyer* v. *Brimfield Twp. Bd. of Trs.*, 2006 WL 1644377, at *3-*6 (N.D. Ohio June 12, 2006); *R.R.* v. *Bd. of Educ. of Kingsport City*, 2006 WL 1211163, at *3-*4 (E.D. Tenn. Apr. 28, 2006); *Hopson* v. *Wal-Mart*, 2006 WL 939004, at *2-*3 (W.D. Ky. Apr. 10, 2006); *Daniels* v. *Retired Senior Volunteer Program*, 2006 WL 783438, at *3-*6 (S.D. Ohio Mar. 27, 2006); *Boykin* v. *Van Buren Twp.*, 2006 WL 305751, at *8-*11 (E.D. Mich. Feb. 9, 2006); *Saalman* v. *Reid*, 2006 WL 278412, at *3-*4 (S.D. Ohio Feb. 3, 2006); *Wilcher* v. *City of Akron*, 2005 WL 3338378, at *2-

*4 (N.D. Ohio Dec. 8, 2005); *Gant* v. *Bowles*, 2005 WL 2994443, at *3-*4 (M.D. Tenn. Nov. 3, 2005); *Brewster* v. *Cooper Indus.*, 2005 WL 2403734, at *7 (E.D. Ky. Sept. 28, 2005); *Friedrich* v. *Southeast Christian Church of Jefferson County*, 2005 WL 2333633, at *1-*3 (W.D. Ky. Sept. 22, 2005); *Atkins* v. *Garcia Lab., Inc.*, 2005 WL 2173542, at *2 (E.D. Mich. Sept. 1, 2005); *Piper* v. *R.J. Corman R.R. Group*, 2005 WL 1523566, at *6-*7 (E.D. Ky. June 28, 2005); *Young* v. *City of Sandusky*, 2005 WL 1491219, at *3-*4 (N.D. Ohio June 23, 2005); *Benford* v. *Smith*, 2005 WL 1325003, at *2-*3 (E.D. Tenn. June 3, 2005); *Farmer* v. *Pike County Agric. Soc'y*, 411 F. Supp. 2d 838, 844-45 (S.D. Ohio 2005); *Oliver* v. *City of Memphis*, 2004 WL 3316242, at *4-*5 (W.D. Tenn. Dec. 2, 2004); *Smith* v. *Detroit Entm't LLC*, 338 F. Supp. 2d 775, 786-92 (E.D. Mich. 2004); *Kennedy* v. *Bank One Corp.*, 2002 WL 31008340, at *2 (E.D. Mich. Aug. 15, 2002); *Barbee* v. *Wal-Mart Stores, Inc.*, 2002 WL 1784318, at *2 & n.3 (W.D. Tenn. July 16, 2002); *McCord* v. *City of Columbus*, 225 F. Supp. 2d 804, 810 (S.D. Ohio 2002); *Canter* v. *Hardy*, 188 F. Supp. 2d 773, 795-97 (E.D. Mich. 2002); *Thompson* v. *City of Columbus*, 2001 WL 1681129, at *6-*7 (S.D. Ohio Sept. 26, 2001); *Siskaninetz* v. *Wright State Univ.*, 175 F. Supp. 2d 1018, 1022-27 (S.D. Ohio 2001); *Hayes* v. *Allstate Ins. Co.*, 95 F. Supp. 2d 832, 835-36 (W.D. Tenn. 2000); *Cmtys. for Equity* v. *Michigan High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 738-40 (W.D. Mich. 2000); *Williams* v. *Payne*, 73 F. Supp. 2d 785, 798-802 (E.D. Mich. 1999); *Durso* v. *Kentucky Ass'n of Counties, Inc.*, 32 F. Supp. 2d 929, 931-33 (E.D. Ky. 1999); *Kelly* v. *Forest Hills Local Sch. Dist. Bd. of Educ.*, 19 F. Supp. 2d 797, 801-02 (S.D. Ohio 1998); *Black* v. *Barberton Citizens Hosp.*, 8 F. Supp. 2d 697, 700-01 (N.D. Ohio 1998); *Sanders* v. *Prentice-Hall Corp. Sys., Inc.*, 969 F. Supp. 481, 484-86 (W.D. Tenn. 1997); *Rudy* v. *Vill. of Sparta*, 990 F. Supp. 924, 930-31 (W.D. Mich. 1996); *Holley* v. *Deal*, 948 F. Supp. 711, 715 (M.D. Tenn. 1996); *Perdue* v. *Quorum Health Resources, Inc.*, 934 F. Supp. 919, 922-23 (M.D. Tenn. 1996); *Graham* v. *Tennessee Secondary Sch. Athletic Ass'n*, 1995 WL 115890 (E.D. Tenn. Feb. 20, 1995); *Worrall* v. *Irwin*, 890 F. Supp. 696, 702-04 (S.D. Ohio 1994); *Lintz* v. *Skipski*, 807 F. Supp. 1299, 1305-06 (W.D. Mich. 1992).

3. The opinion below represents the latest installment in the Sixth Circuit's abrogation of *Lugar*. Citing *Chapman* and *Wolotsky*, the decision below again equates the "fair attribution inquiry" with only the second element of the state action test. The Sixth Circuit cited this Court's decision in *Lugar*, but applied the Sixth Circuit's settled rule abrogating the first element of the two-part test announced by this Court. The Sixth Circuit held:

> A private actor acts under color of state law when its conduct is "fairly attributable to the state." *Lugar*[, 457 U.S. at [937]]. "The Supreme Court has developed three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test."

Pet. App. 9a.

The court of appeals' rule affords no weight to the fact that a private defendant's conduct was not "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. Rather, based only on its determination that petitioners had exercised the public function of arrest, the court concluded that the plaintiffs had satisfied the state action requirement of Section 1983. Thus, as in its en banc decision in *Chapman*, the Sixth Circuit ruled in favor of a Section 1983 plaintiff without regard to whether the state policy component of *Lugar* had been satisfied.

It is clear that unless this Court grants review, the Sixth Circuit will continue to disregard the first prong of *Lugar* in Section 1983 suits against private defendants. This case perfectly illustrates the seriousness of the court of appeals' error. In this case, the "deprivation" of respondent's rights is not "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Ibid.* Mere

"private misuse of a state statute does not describe conduct that can be attributed to the State." *Lugar*, 457 U.S. at 941.

Respondent's complaint, like the complaint in *Lugar*, alleges merely that a private party had misused a state statute. The gravamen of respondent's Fourth Amendment claim is that she was arrested without probable cause because the token she picked up was abandoned property. See Pet. App. 6a. But Michigan undoubtedly did not authorize petitioner Brown to arrest respondent in the absence of probable cause: As a private security police officer, petitioner Brown was authorized, pursuant to Michigan Compiled Laws (MCL) § 338.1080, only "to arrest a person without a warrant as set forth for public peace officers in [MCL § 764.15]." And, unsurprisingly, Section 764.15, while setting forth multiple grounds under which Michigan police officers are authorized to make warrantless arrests, does not authorize the arrest of a person who has not committed a crime and whom the officer has no reasonable cause to believe has committed a crime. Thus, respondent's Fourth Amendment claim challenges no more than the "private misuse of a state statute," *Lugar*, 457 U.S. at 941, as petitioner Brown was "acting contrary to the relevant policy articulated by the State," *id.* at 940. Because her alleged "invoc[ation of] the statute without the grounds to do so c[an] in no way be attributed to a state rule or a state decision," *ibid.*, the state policy component of *Lugar* is not satisfied.[4]

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[4] The Sixth Circuit's abrogation of the *first* element of this Court's state action test is not excused on the ground that petitioners were allegedly performing a "public function" under the *second* element. As *Lugar* explains, although claims involving government employees need not satisfy the first element, this "apparent authority" doctrine derived from *Monroe* v. *Pape* does not apply to private defendants. Consistent with *Lugar*, *Womancare*, and *Ouzts*, *supra*, petitioners' review of the post-*Lugar* appellate precedents has not revealed a single published federal circuit court opinion applying the "abuse of authority"

Certiorari accordingly should be granted to correct the Sixth Circuit's consistent abrogation of the first element of this Court's holding in *Lugar*. The Court may wish to consider summary reversal.[5]

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doctrine to hold a private party liable for conduct not involving also governmental entities. Only two cases hold private defendants liable under Section 1983 for misuse of a state statute; in both, the private parties acted jointly with state officials. See *Greco* v. *Guss*, 775 F.2d 161, 165-69 (CA7 1985); *Howerton* v. *Gabica*, 708 F.2d 380, 384 n.9 (CA9 1983). Thus, in both, the private defendants did "have the authority of state officials to put the weight of the State behind their private decision." *Lugar*, 457 U.S. at 940.

There was no such involvement by any state official in this case. The mere fact that petitioner Brown was licensed as a private security police officer under Michigan Compiled Laws § 338.1079 is insufficient to implicate the "abuse of authority" doctrine, as the license only granted Brown authority to make arrests pursuant to Michigan Compiled Laws § 764.15: if private misuse of a statute is not state action under *Lugar*, neither is private misuse of a license simply granting permission to use a statute; in both cases, the defendant is acting "contrary to the relevant policy articulated by the State." *Lugar*, 457 U.S. at 940.

[5] Petitioners principally argued in the district court and on appeal that their conduct did not constitute state action subject to suit under Section 1983. That argument is sufficient to preserve for review in this Court the subsidiary contention that respondent's claim was precluded by the first prong of the state action inquiry. Petitioners could not reasonably be expected to press that particular argument in the face of a wall of on-point, settled circuit precedent (including the en banc decision in *Chapman*). Indeed, no defendant can be expected to make such an argument in that court. But in any event, this Court may decide the question so long as it was "passed upon" by the court of appeals (*Verizon Comms.* v. *FCC*, 535 U.S. 467, 531 (2002)), which it was. The Sixth Circuit rested its holding squarely on its precedent holding that state action is present so long as one of the three tests for establishing that the defendant is a "state actor" under the second prong of the state action inquiry. See *supra* at 6-8.

## II. Certiorari Is Warranted To Resolve The Circuit Split Regarding Whether An Individual Becomes A State Actor Under The Second Prong Of *Lugar* By Virtue Of Possessing Arrest Authority.

### A. The Lower Courts Are Divided over Whether the State-Conferred Power to Arrest Transforms Private Security Guards into State Actors.

This Court has left open the question of how, or whether, a private individual is subject to constitutional tort liability based upon state-sanctioned authority to perform police-type functions. See *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 163 n.14 (1978); see also Pet. App. 10a. That question has divided the circuits. The Sixth Circuit holds that "the authority to make arrests at one's discretion and for any offenses" renders the possessor "a state actor as a matter of law," because plenary arrest power is "traditionally reserved to the state alone." Pet. App. 13a-14a (footnote omitted). This holding is squarely at odds with the reasoning and result of decisions of three other circuits and several state courts, including a holding of the Supreme Court of Michigan addressing the very statute at issue here. These other courts hold that the arrest power falls outside the sphere of state action because arrest has also traditionally been the prerogative of private citizens, and that private security guards do not become police officers merely by virtue of statutory arrest authority.

1. Substantial authority in both state and federal courts draws a clear line for state action purposes between arrests by *citizens* (such as petitioner Brown) and arrests by *police officers*. Unlike the ruling below, these decisions recognize that neither possession nor exercise of arrest authority transforms private parties into state actors, and discredit the notion that arrest is a "traditional public function."

The Fifth, Seventh, and Tenth Circuits have all expressly refused to conflate a citizen's power of arrest with that of a police officer. The Fifth Circuit in *White* v. *Scrivner Corp.*

rejected a Section 1983 lawsuit against a grocery-store chain and its employees, holding that the public function test is not satisfied when the employees searched the plaintiffs on suspicion of shoplifting and detained them after the search turned up a handgun, but no stolen property. 594 F.2d 140, 141 (1979). The court held that "[w]hile these actions are usually performed by police officers. private citizens do occasionally engage in them. * * * Once the defendants found the gun, detention of the women until the arrival of the police was * * * not an action outside the realm of common experience." *Id.* at 143.

Likewise, in *Carey* v. *Continental Airlines, Inc.*, the Tenth Circuit held that a citizen's arrest for trespassing did not constitute state action under Section 1983, explaining that "[i]f [defendant Gary] Gilbert himself made a 'citizen's arrest' of [plaintiff Daniel] Carey, as Carey asserts, this does not make Gilbert a state actor." 823 F.2d 1402, 1404 (1987). The Tenth Circuit has furthermore read its decision in *Carey* to support the conclusion that private security guards cannot meet the traditional public function test. See *Gallagher* v. *Neil Young Freedom Concert*, 49 F.3d 1442, 1457 (1995) ("[O]ur conclusion that private citizens making arrests were not state actors because they did not act in concert with state officials suggests that the mere performance of security functions such as those here at issue is not traditionally an exclusive function of the state.").

The Seventh Circuit has similarly stated that arrest authority is not a public function, because it was traditionally shared by private and public actors due to the tradition of citizen's arrests. In *Wade* v. *Byles*, 83 F.3d 902, 906 (1996), the Seventh Circuit held that powers granted by the City of Chicago to a municipal security guard, including the authority to arrest trespassers, did not make him a state actor. The Seventh Circuit noted that such powers had not been "*exclusively* reserved to the police," citing an Illinois statute "providing for citizens' arrests" and caselaw "noting that powers of arrest and self-defense are not exclusively

governmental functions." *Ibid.*; see also *Payton* v. *Rush-Presbyterian-St. Luke's Medical Center*, 184 F.3d 623, 629 (CA7 1999) ("[C]itizen's arrests * * * are available to individuals outside of the law enforcement community * * *.").

The decision below is similarly in conflict with the Supreme Court of Michigan's decision in *City of Grand Rapids* v. *Impens*, 327 N.W.2d 278 (1982), a case involving the same Michigan statute at issue here. In *Impens*, a criminal defendant sought to suppress a statement to licensed security guards on the ground that the guards had not warned him of his *Miranda* rights. *Id.* at 279. The Michigan Supreme Court rejected the defendant's argument – parallel to respondent's argument in this case – that "the licensing statutes which regulate private security guards demonstrate the requisite degree of state action to bring their activities under color of state law." *Id.* at 281. The court explained that the statutes' grant of authority to private security guards is merely "an extension of the commonlaw shopkeepers' privilege to detain for a reasonable period of time a person suspected of theft or failure to pay." *Ibid.*[6]

Several other state courts have reached results in accord with *White*, *Carey*, and *Impens*, and therefore in conflict with the Sixth Circuit's holding here. See *State* v. *Kemp*, 205 So. 2d 411, 415 (La. 1967) (refusing to consider suppressing evidence obtained in citizens' arrest for shotgun assault because "[t]he arrests in question were made by private persons—not by officials"); *Hood* v. *Commonwealth*, 448 S.W.2d 388 (Ky. 1969) (holding *Miranda* warnings were not

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[6] The decision below unpersuasively attempts to distinguish *Impens* by stating that *Impens*, unlike the present case, did not involve involuntary detention. Pet. App. 13a n.2. In fact, *Impens* unequivocally states that the security guards obtained the contested statements "in a *custodial* environment," 372 N.W.2d at 280 (emphasis added), and expressly refers to the suspect's "detention," *id.* at 281.

required when citizens arrested suspects in barn burnings, because citizens were not state actors); *Hubbard* v. *State*, 234 A.2d 775, 779 (Md. App. 1967), cert. denied, 393 U.S. 889 (1968) (holding that no *Miranda* warnings were required when suspected rapist made statements to pharmacists who were detaining him); *Commonwealth* v. *Corley*, 491 A.2d 829 (Pa. 1985) (holding exclusionary rule inapplicable to citizen's arrest due to absence of state action).

2. In addition to the conflict over whether arrest power is an exclusively public function, the Sixth and Seventh Circuits moreover exhibit a deep and intractable conflict regarding the separate question whether a private individual must also have *other* police powers besides arrest in order to be considered a state actor. The Seventh Circuit has determined that security guards qualify as state actors based upon the public function test only when – unlike petitioners here – they are "entrusted with *all* the powers possessed by the police." *Payton*, 184 F.3d at 630 (emphasis added). Thus, the Seventh Circuit has held that guards merely "authorized to carry a handgun, arrest people for criminal trespass pending arrival of the police, and use deadly force in self-defense" could not qualify as state actors, because as a result of these limitations and the spatial confinement of their authority to the lobbies in which they worked, the court was not "faced with a situation where a state has delegated its entire police power to a private police force." *Wade*, 83 F.3d at 905-06. Petitioners here would have prevailed under the Seventh Circuit's test, as it cannot be disputed that their authority is substantially more limited than that of a fully vested officer of the law.

The decision below, relying primarily on *Payton* v. *Rush-Presbyterian-St. Luke's Medical Center*, erroneously purports to be in accord with the jurisprudence of the Seventh Circuit. *Payton*, however, found state action only in the extreme circumstances in which "*no legal difference exist[ed]*" between a private security guard and a "regular Chicago police officer." 184 F.3d at 630 (emphasis added). In particular, *Payton* involved city ordinances designating the

defendants as "special police officers." See *id.* at 624-25. They were subject to all the rules and regulations applicable to ordinary police officers, reported to the superintendent of police as the superintendent required, wore police-issued badges, and "possess[ed] the powers of the regular police patrol at the places for which they are respectively appointed or in the line of duty for which they are engaged." *Id.* at 625.

Petitioner Brown, by contrast, unquestionably did not possess the full panoply of police authority. Her arrest power was expressly limited to the boundaries of her employer's property and her hours of employment. Mich. Comp. Laws 338.1080. Thus, she could not, for example, pursue a fleeing suspect outside the casino or arrest anyone during her off-hours. The statute moreover expressly seeks to differentiate her authority from that of an ordinary police officer by requiring that she be in a special uniform when making an arrest. *Ibid.* The uniform cannot be one that would "deceive or confuse the public or be identical with that of a law enforcement officer," and must include shoulder patches at least three inches by five inches in size that clearly designate the name of the private employer. *Id.* § 338.1069(1). Petitioner Brown was also prohibited by state regulation from carrying or wielding a weapon during the exercise of her security duties. See MGCRA Rule 432.1212. Unlike in *Payton*, therefore, there exist significant "legal difference[s]" between petitioners' authority as private citizens and police officers' authority as public officials. 184 F.3d at 630.

Indeed, the Seventh Circuit itself, in a subsequent decision, rejects the notion that even the extensive regulatory scheme present in *Payton* is per se sufficient to subject private security personnel to constitutional liability. In *Johnson* v. *LaRabida Children's Hospital*, 372 F.3d 894, 897-98 (2004), the court found that a hospital guard made a special police officer under the Chicago ordinance was not, in fact, a state actor for purposes of Section 1983. The court based its holding on the limited nature of the defendant's hospital-patrol duties, concluding that "this is not a case where the

state had delegated its entire police power to a private police force." *Id.* at 898 (internal alterations and quotation marks omitted). Neither is the present case, and the Seventh Circuit would consequently have barred respondent's Section 1983 suit.

The conflict presented by this case has important practical dimensions that call for this Court's intervention. The split of authority between Michigan and the Sixth Circuit as to the effect of the Michigan statute is intractable. Though the highest court of the state would not consider petitioners to be state actors, respondent and others similarly situated can avoid the effect of this conclusion by suing under Section 1983 and invoking federal question jurisdiction.

Additionally, the split among the circuits creates great unfairness for a substantial number of potential defendants. The private security industry is large and growing, employing a significant segment of the American workforce. See, *e.g.*, *Impens*, 327 N.W.2d at 681 (Kavanagh, J., dissenting). As this case well illustrates, security guards and their employers in the Sixth Circuit can be subjected to massive constitutional tort liability, including prohibitive punitive damage awards that might be unavailable under state law. Those in the Fifth, Seventh, and Tenth Circuits cannot. Those in circuits yet to resolve the question face the specter of such liability. Only this Court can bring resolution to this important and recurring issue.

### B. The Sixth Circuit's Decision Is Incorrect Under This Court's Precedents Governing State Action.

The decision below cannot be reconciled with this Court's precedents limiting private parties' liability for constitutional violations. In order to violate the Fourteenth Amendment and therefore be held liable under Section 1983, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). The court below held that petitioners are state actors as a matter of law because they perform a

public function through their arrest authority. See Pet. App. 13a-14a.

That conclusion is irreconcilable with this Court's precedents. As this Court stated in *Jackson* v. *Metropolitan Edison Co.*, private parties are state actors on the basis of the public function test only if they exercise a power that has "traditionally" been "exclusively reserved to the state." 419 U.S. 345, 352 (1974). This category is limited: "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 158 (1978). Arrest power lies far afield of the limited set of functions that this Court has recognized as "public" for state action purposes. Compare, *e.g.*, *Evans* v. *Newton*, 382 U.S. 296 (1966) (municipal park); *Terry* v. *Adams*, 345 U.S. 461 (1953) (election); *Marsh* v. *Alabama*, 326 U.S. 501 (1946) (company town); *Nixon* v. *Condon*, 286 U.S. 73 (1932) (election).

Critically, the power to effect arrest has not historically been "exclusively reserved to the state." *Jackson*, 419 U.S. at 352. "[N]o aspect of policing, neither patrol nor detection, has ever been 'exclusively' performed by the government, and all have at one point or another been left largely to private initiative." David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165, 1259 (1999). First, many jurisdictions have long protected by statute the right of guards or others to make arrests under some circumstances, as Michigan does. *Id.* at 1184. Second, in other jurisdictions, the authority of officers and citizens has traditionally been virtually identical with respect to warrantless arrests. *Ibid.* "The difference between the arrest powers of police officers and private citizens, then, comes down to this: a private citizen, unlike a police officer, is liable for false arrest if he or she arrests someone based on probable cause to believe the arrestee committed a felony, but it turns out that the felony had not actually been committed." *Id.* at 1185. Finally, even this minimal distinction between the arrest powers of officers and ordinary citizens "was not always drawn, and not all states draw it today." *Id.* at 1185.

Because arrest authority has been and remains a function shared by citizens and police officers, certiorari is warranted to correct the Sixth Circuit's erroneous holding that private citizens are state actors simply because they possess arrest authority.

## III. The Punitive Damages Imposed By The Decision Below Violate Due Process.

In the event that this Court concludes that the state action issues presented above do not warrant review, it should at the very least hold the petition pending its decision in *Philip Morris USA* v. *Williams*, No. 05-1256, as the judgment of the Sixth Circuit also raises a serious question about the constitutionality of the punitive damages award imposed and *Philip Morris* will provide guidance for answering that question.[7]

The Sixth Circuit, although reducing the $875,000 punitive damage award imposed by the jury, nevertheless gave respondent the option (which she subsequently accepted) of a $600,000 remittitur. See Pet. App. 34a. Because the compensatory damages in this case were only $279.05, see *id.* 8a, the Sixth Circuit sanctioned an award of punitive damages that was more than 2150 times the damages actually suffered by respondent.

The court justified its extraordinary holding based on essentially four factors: First, it emphasized what it perceived to be an "inexplicable and egregious" temporary detention, interrogation, and humiliation of an elderly woman following her use of an abandoned five-cent token. See Pet. App. 23a-25a. Second, it quoted this Court's passing statement that higher ratios may be permissible when particularly egregious conduct causes only minimal actual damages. See *id.* 27a

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[7] In the event the Court grants certiorari to decide the state action question, it could simply note in its opinion if appropriate that on remand the court of appeals should reconsider its punitive damages holding in light of this Court's decision in *Philip Morris*.

(quoting *BMW of North America* v. *Gore*, 517 U.S. 559, 582 (1996)). Third, it compared punitive damage awards in similar cases. See *id.* 26a-31a. Fourth, it relied upon the fact that the defendant was a wealthy casino. See *id.* 29a-30a, 33a.

It is certainly true that this Court has twice noted in dicta that "ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" See *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 425 (2003) (quoting *Gore*, 517 U.S. at 582). That this Court stated only that some higher ratios *may* comport with due process, however, signals that even in cases with low compensatory damages, the constitutional requirement remains intact that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Campbell*, 538 U.S. at 426; see also *Gore*, 517 U.S. at 580 (noting the "long pedigree" of the requirement that punitive damages bear a "reasonable relationship" to compensatory damages).

But in this case, the Sixth Circuit essentially abandoned its responsibility to ensure that there was a reasonable relationship between the two damage awards, once it had concluded that some higher ratio was permissible because of what it perceived to be particularly egregious conduct causing minimal actual damages. First, aside from cases involving nominal damages, the relatively small ratios in the cases that the Sixth Circuit cited to justify multiple-digit ratios actually underscore how grossly excessive a 2150-to-1 ratio is. See Pet. App. 26a (citing *Argentine* v. *United Steel Workers of Am., AFL-CIO, CLC*, 287 F.3d 476, 488 (CA6 2002) (42.5-to-1 ratio); and *Dean* v. *Olibas*, 129 F.3d 1001, 1007 (CA8 1997) (14-to-1 ratio)). Second, aside from cases involving police brutality, $600,000 vastly exceeds the amount of punitive damages imposed in all but one of the false arrest or malicious prosecution cases that the Sixth Circuit cited for

purposes of comparison, even though many of those cases involved conduct far more egregious than that present in this case. See Pet. App. 26a-31a (citing cases involving strip searches or criminal arrest and prosecution). Indeed, in the only case affirming an award as large as $600,000, a wealthy corporate defendant, Wal-Mart, had wrongfully caused a pregnant woman shopping on Christmas Eve with her children to be arrested, jailed, and tried for shoplifting; even on those facts, a $600,000 punitive award was the maximum permitted by due process. See *id.* 30a-31a (discussing *Wal-Mart Stores, Inc.* v. *Goodman*, 789 So. 2d 166, 171 (Ala. 2000)). Perhaps offended by what it perceived to be the "inexplicable and egregious" treatment of respondent and certainly insufficiently attentive to this Court's admonition that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," *Campbell*, 538 U.S. at 427-28, the Sixth Circuit ultimately failed to ensure that the punitive damages it imposed were reasonable and proportionate when it consciously chose an award that was "sixty per cent of the casino's daily intake at the time of the verdict," Pet. App. 33a.

*Philip Morris USA* v. *Williams*, No. 05-1256, will provide substantial guidance on the propriety of the punitive damages imposed below. On May 30, 2006, this Court granted the writ of certiorari in *Philip Morris*, limited to the first two questions presented in the petition. One of those questions is "[w]hether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can 'override' the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm." Pet. (I). In *Philip Morris*, the Oregon Supreme Court affirmed a punitive damages award that was ninety-seven times the compensatory damages, *ibid.*, in light of conduct by the defendants perceived to be extraordinarily reprehensible, *see id.* at 5-6. This Court's resolution of whether the reprehensibility guidepost can "override" the ratio guidepost

will have obvious relevance to whether the Sixth Circuit was justified in allowing a 2150-to-1 ratio based largely on the perceived egregiousness of petitioners' conduct. More generally, in light of the fact that this Court has only two precedents interpreting *Gore*'s ratio guidepost, the analysis and discussion in *Philip Morris* will inevitably inform and improve the Sixth Circuit's analysis given that the court of appeals was previously forced to rely upon appellate jurisprudence that the petitioners in *Philip Morris* properly characterized as exhibiting an intolerable level of conflict and confusion. *See id.* at 14. For this reason, in the event that this Court decides that the state action issues in this case do not warrant granting review, the petition should at the least be held pending the decision in *Philip Morris* and then disposed of accordingly.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

United States Court of Appeals,
Sixth Circuit.

Stella ROMANSKI, Plaintiff-Appellee,

v.

DETROIT ENTERTAINMENT, L.L.C., d/b/a/ MotorCity Casino, a Michigan Limited Liability Company; Marlene Brown, Defendants-Appellants,

Gloria Brown; Robert Edwards; and JoEtta Stevenson, Defendants.

No. 04-1354.

Argued: April 27, 2005.
Decided and Filed: Oct. 28, 2005.
Rehearing and Rehearing En Banc Denied Feb. 6, 2006.

Farris, Circuit Judge, dissented and filed opinion.

ARGUED: Megan K. Cavanagh, Garan Lucow Miller, P.C., Detroit, Michigan, for Appellants. Neil H. Fink, Law Offices of Neil H. Fink, Birmingham, Michigan, for Appellee. ON BRIEF: Megan K. Cavanagh, Rosalind Rochkind, Robert F. MacAlpine, Garan Lucow Miller, P.C., Detroit, Michigan, for Appellants. Neil H. Fink, Law Offices of Neil H. Fink, Birmingham, Michigan, Richard G. Lewandowski, S. David McNeill, Freeman McNeill, Birmingham, Michigan, for Appellee.

Before: KEITH, CLAY, and FARRIS, Circuit Judges.[1]

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[1] The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

CLAY, J., delivered the opinion of the court, in which KEITH, J., joined.

FARRIS, J. (pp. 650-52), delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge.

A jury in the Eastern District of Michigan found Defendants Detroit Entertainment, L.L.C., which owns and operates the MotorCity Casino (we refer to both as "the casino"), and Marlene Brown, one of the casino's security personnel and a private security police officer with the power to arrest, liable under 42 U.S.C. § 1983 and under Michigan law for unlawfully arresting Stella Romanski. Defendants contend the judgment must be reversed and a new trial granted because the district court instructed the jury as a matter of law that Defendants acted under color of state law at all times relevant to this case. Defendants also raise other instruction-related claims. In the alternative, Defendants ask us to remit some of the $875,000 punitive damages award or order a new trial on the issue of damages.

We AFFIRM the judgment of the district court in all respects except that we VACATE the portion of the judgment comprised by the punitive damages award and REMAND for a remittitur of the punitive damages award, in accordance with the instructions of this opinion, or a new trial on the issue of punitive damages. The remarkable facts of this case make it indisputable that a substantial punitive damages award is warranted. Defendants' conduct was particularly egregious and a higher award to deter the casino from sanctioning such conduct in the future was appropriate. But an award of $600,000 will just as adequately serve the interests of punishment and deterrence and fits more comfortably in the ballpark of punitive awards that have been upheld in similar cases. We therefore order a remittitur to

that amount or, if Romanski so chooses, a new trial on damages.

## I. BACKGROUND

On August 7, 2001, Romanski, then 72 years old, and her friends Dorothy Dombrowski and Linda Holman, went to Defendant Detroit Entertainment's MotorCity Casino in Detroit, Michigan, to gamble and enjoy lunch at the buffet. After a spate of unsuccessful tries at the slot machines, Romanski took a walk around the gaming floor. During her walk, Romanski noticed a five cent token lying in a slot machine's tray. Seeing no chair at the machine, she picked up the token and returned to the machine at which she had earlier played, intending to use the token there. Soon a uniformed male casino employee approached and asked that she accompany him to the office. She asked why but he did not answer. Romanski then noticed there were also three female casino employees, these not in uniform, surrounding her; she felt she could not move.

One of these plain-clothed security officers was Defendant Marlene Brown, who had been assigned to patrol the casino floor at that time. Brown testified that she approached Romanski, displayed her casino security badge, and began to explain it was the casino's policy not to permit patrons to pick up tokens, which appeared to be abandoned, found at other slot machines, a practice known as "slot-walking." Romanski could not have known this at the time because the casino does not post the so-called policy anywhere. It is undisputed, therefore, that Romanski did not have – and could not have had – notice of the casino's purported policy on slot-walking.

According to Brown, Romanski became loud and belligerent, so, at the advice of Brown's supervisor, JoEtta Stevenson (a defendant below), Brown escorted Romanski to an off-the-floor room where Brown intended to explain the policy in detail. For her part, Romanski testified that Brown

did not detain her because of her attitude but rather because Brown suspected her of theft.

It is undisputed that Brown and her colleagues escorted Romanski to what Defendants alternately call the "security office" and the "interview room." Whatever its name, the room is small and windowless, located off the casino's floor. According to Romanski, once they had taken their seats, Brown accused Romanski of stealing the token, whereupon Brown counted Romanski's money and removed one nickel from Romanski's winnings. Stevenson asked Romanski to turn over her social security card and driver's license; Romanski complied and these items were photocopied. Romanski was then photographed. Romanski testified that she acquiesced to these requests because Brown said she was a police officer, had a badge, and appeared to have handcuffs. Brown admitted having presented her badge and possessing handcuffs but testified that she identified herself only as a "security police officer," not as a bona fide police officer. There is no dispute that a uniformed casino security officer stood just outside the room for the duration of the questioning.

Romanski was ejected from the casino for a period of 6 months; Stevenson made the final decision to eject, or "86," Romanski. The precise ground for ejecting Romanski is unclear from the record. Although unknown to Romanski at the time, it is now undisputed that Brown and some of her colleagues on the casino's security staff were licensed under state law as "private security police officer[s]." Mich. Comp. Laws (M.C.L.) § 338.1079. By virtue of being so licensed, a private security police officer has "the authority to arrest a person without a warrant as set forth for public peace officers ... when that private security police officer is on the employer's premises." M.C.L. § 338.1080. The statute additionally requires that private security police officers make arrests only when they are on duty and in "the full uniform of the[ir]employer." *Id.* It is undisputed that Brown was on duty during the events of this case. It is also undisputed that

Brown was not wearing the uniform worn by some of the other security guards, but Defendants have never contended that this rendered Brown out of uniform for purposes of § 338.1080; indeed, Defendants have conceded from the beginning that the statute applies in this case. Their argument is simply that the power admittedly conferred on Brown by the statute did not make her actions under color of state law. *See* 42 U.S.C. § 1983.

Brown was in charge of escorting Romanski to the valet parking area of the casino, where Romanski was to wait for her 3 p.m. bus home. Brown and her colleagues denied Romanski's request to meet her friends for lunch at the buffet – indeed, they did not permit Romanski to eat lunch at all. In addition, they did not permit Romanski to enter the restroom by herself; Brown accompanied Romanski into the restroom and waited outside the stall. At 3 p.m., Romanski exited the valet area to board what she thought was her bus; it turned out not to be but instead of returning to the valet area she ran into her friends and stayed outside. It was extremely hot and humid and Dombrowski and Holman persuaded Romanski to return to the casino. Upon entering, the three were confronted by casino employees, who directed them to return to the valet area, which is air-conditioned; they waited there until the bus arrived.

It is undisputed that Brown prepared an incident report following Romanski's ejection in which Brown referred to Romanski as a "suspect." Romanski introduced the casino's security manual into evidence; it instructs security employees to refer to patrons as "suspects" only if the employee arrested the patron and otherwise to refer to the patron as a "subject." Stevenson confirmed that this policy was in effect when Romanski was ejected. Finally, it is undisputed that as a matter of course, the casino notifies the Michigan State Police when it ejects someone; the casino notified the Michigan State Police of Romanski's ejection.

As these facts reflect, Defendants' treatment of Romanski was inexplicable and egregious. The district court aptly expressed the egregiousness of Defendants' conduct in its opinion denying Defendants' motion for summary judgment: "There is sufficient evidence to allow a jury to find that after [Romanski] picked up an abandoned token that Defendants – by using the authority vested in them by the State of Michigan – surrounded her, arrested her, led her to the security office, prevented her from leaving the security office, and stole the five cents that she found from her. Afterwards, they surrounded her as they threw her out of the casino, and refused to let her use the restroom by herself. Defendants also prevented her from having lunch with her friends [and] falsely told her friends that she had stolen from them .... [A] jury could certainly exclaim 'Outrageous.'" *Romanski v. Detroit Entertainment, L.L.C.*, 265 F.Supp.2d 835, 848-49 (E.D.Mich.2003) (citations omitted). Indeed, a jury *did* make such an exclamation: it found in Romanski's favor and made a substantial punitive damages award.

In November 2001, Romanski sued Defendants MotorCity Casino and two un-named employees of the casino in the Circuit Court of Wayne County, Michigan, alleging false arrest, false imprisonment, defamation, and intentional infliction of emotional distress. In an amended complaint, Romanski named as defendants Detroit Entertainment, L.L.C., d/b/a MotorCity Casino, Marlene Brown, Gloria Brown, Robert Edwards, and Joetta Stevenson, the individual defendants being the employees involved in Romanski's detention, questioning, and ejection from the casino. The amended complaint also included a new cause of action, namely, a claim under 42 U.S.C. § 1983 that Defendants had violated Romanski's Fourth Amendment rights. Specifically, Romanski alleged that Defendants, acting under color of state law, had arrested her without probable cause because the token she picked up was abandoned, i.e., not the casino's property.

Defendants removed the action to federal district court in the Eastern District of Michigan. The district court issued an order to show cause "as to whether Defendants' conduct was 'under color of law' for purposes of 42 U.S.C. § 1983" and considered the parties' briefs on the issue. The court concluded that Brown was acting under color of state law because she possessed the same authority to make arrests that the police enjoy. Having determined that there was a proper basis for federal jurisdiction, the district court exercised its supplemental jurisdiction over Romanski's state law claims.

The parties conducted discovery from September 2002 through February 2003. On March 6, 2003, Defendants moved for summary judgment on all claims. On the § 1983 claim, Defendants argued that they were not acting under color of state law in this case and in any event had probable cause to detain Romanski. In a published decision, the district court denied Defendants' motion for summary judgment. 265 F.Supp.2d 835 (E.D.Mich.2003). The court held as a matter of law that Defendants had acted under color of state law during the events of this case because Brown, the defendant who initiated Romanski's detention, did so while on duty in her capacity as a licensed private security police officer empowered with the same arrest authority as a public police officer. *Id.* at 841-43. The court further held that genuine factual disputes precluded summary judgment on the Fourth Amendment claim and Romanski's state law claims. *Id.* at 844-49.

The trial began on July 15, 2003. At the close of Romanski's case-in-chief, Defendants moved for judgment as a matter of law on all claims and asked the district court to reconsider its conclusion on the state action[1] question. The

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[1] Throughout this opinion we use the terms "state actor" or "state action" and "acting under color of state law" interchangeably. As the Supreme Court has held: "[i]f a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes."

district court declined to rule on the motion, reserving it for a later ruling. At the charge conference and during the parties' exchange of proposed jury instructions, Defendants again raised the state action question, arguing that the jury should be instructed to find as a matter of fact whether Defendants were acting under color of state law. The district court disagreed and instructed the jury as follows: "Acting under color of law in this case simply means acting in one's capacity as a licensed security officer with powers to make an arrest on the casino premises. I instruct you as a matter of law that the defendants were acting under color of law at the time of this incident and you may find that this element has been established." The other issues in the case were submitted to the jury, which found the casino and Brown liable on the Fourth Amendment wrongful arrest claim and the casino alone liable on the state law false arrest and false imprisonment claims. The jury did not find any of the defendants liable for defamation or intentional infliction of emotional distress but, based on its verdict on Romanski's other claims, the jury awarded $279.05 in compensatory damages. Based exclusively on the verdict in favor of Romanski on her § 1983 claim, the jury awarded $500 in punitive damages against Brown, and $875,000 in punitive damages against the casino.

Defendants moved for a judgment not withstanding the verdict or, in the alternative, for a new trial. *See* Fed.R.Civ.P. 50, 59. The district court denied the motion, resting largely on the reasoning expressed in its summary judgment ruling. The casino and Brown (the only defendants found liable by the jury) brought this timely appeal. They argue that: (1) it was improper for the district court to hold they were state actors as a matter of law and accordingly seek either a new

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*Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 n. 2, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)).

trial or judgment in their favor on the § 1983 claim; (2) in connection with Romanksi's claim that Defendants lacked probable cause to arrest her, the district court gave an erroneous jury instruction on the issue of whether the token was abandoned; (3) apparently in connection only with Defendants' own desire for a jury instruction on a purported common law right of private businesses to detain patrons suspected of theft, the district court erroneously declined to accept Defendants' proposed instruction; and (4) the $875,000 punitive damages award, imposed exclusively on the basis of the jury's finding of liability under 42 U.S.C. § 1983, is so excessive that it does not comport with due process. We consider each claim in turn.

## II. DISCUSSION

### A. State Action

Section 1983 makes liable only those who, while acting under color of state law, deprive another of a right secured by the Constitution or federal law. 42 U.S.C. § 1983; *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 155, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978); *Chapman v. Higbee Co.,* 319 F.3d 825, 833 (6th Cir.2003) (*en banc* ); *Wolotsky v. Huhn,* 960 F.2d 1331, 1335 (6th Cir.1992). A private actor acts under color of state law when its conduct is "fairly attributable to the state." *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 947, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). "The Supreme Court has developed three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test." *Chapman,* 319 F.3d at 833 (citing *Wolotsky,* 960 F.2d at 1335). *See West v. Atkins,* 487 U.S. 42, 49-50, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (public function); *Flagg Bros.,* 436 U.S. at 157, 98 S.Ct. 1729 (same); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 170, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) (state compulsion test); *Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 721-26, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) (symbiotic relationship or nexus test).

The district court concluded that Brown and any of her colleagues similarly licensed as private security police officers pursuant to M.C.L. § 338.1079 were state actors under the public function test. 265 F.Supp.2d at 841-43. Consistent with this holding, the district court took the state action issue out of the case, granting in effect judgment as a matter of law to Romanski on that issue. Consequently, we review the state action aspect of the district court's decision *de novo* and view all facts in the light most favorable to Defendants. *United States v. Alpine Indus., Inc.*, 352 F.3d 1017, 1022 (6th Cir.2003); *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 258 (6th Cir.2000).

Under the public function test, a private entity is said to be performing a public function if it is exercising powers traditionally reserved to the state, such as holding elections, taking private property under the eminent domain power, or operating a company-owned town. *See Flagg Bros.*, 436 U.S. at 157-58, 98 S.Ct. 1729 (holding elections); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (exercising eminent domain); *Marsh v. Alabama*, 326 U.S. 501, 505- 509, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (operating a company-owned town). The Supreme Court has expressly left open the question whether and under what circumstances private police officers may be said to perform a public function for purposes of § 1983. *Flagg Bros.*, 436 U.S. at 163, 98 S.Ct. 1729. Nevertheless, as the district court observed, there is a growing body of case law to consult for guidance on this question.

For example, in a decision deemed by both parties and the district court to bear directly on the issue presented in this case, the Seventh Circuit held that private police officers licensed to make arrests could be state actors under the public function test. *Payton v. Rush-Presbyterian*, 184 F.3d 623, 627-30 (7th Cir.1999). To be sure, *Payton* was an appeal of a dismissal pursuant to Fed.R.Civ.P. 12(b)(6), but we think this distinction is of little relevance since the crucial fact in that case – assumed to be true there but indisputable here – was

that by virtue of their status as on-duty special police officers, licensed by the city of Chicago, the defendants enjoyed "virtually the same power as public police officers." *Id.* at 629. Indeed, the defendants in *Payton* operated under an ordinance which provided that special police officers licensed under it "shall possess the powers of the regular police patrol at the places for which they are respectively appointed or in the line of duty for which they are engaged." *Id.* at 625 (quoting Chicago City Code § 4-340-100 (1993)).

This broad delegation of power, the Seventh Circuit reasoned, distinguished *Payton* from an earlier case in which the court had held that a private security guard endowed with more limited police-type powers was not a state actor. *See Wade v. Byles,* 83 F.3d 902, 905-906 (7th Cir.1996). The defendant in *Wade* was permitted to carry a handgun and to use deadly force in self-defense but could arrest someone only for "trespass pending the arrival of the police" and could exercise these powers only in the lobbies of properties owned by the public housing authority for which he worked. *Id.* at 906. The defendant was not a state actor because, as the court put it in *Payton,* "none of these powers had been exclusively reserved to the police – citizen's arrests and the rights to carry handguns and use them in self-defense are available to individuals outside of the law enforcement community." *Payton,* 184 F.3d at 629 (citing *Wade,* 83 F.3d at 906).

*Payton* illustrates a line that has been drawn in the case law. The line divides cases in which a private actor exercises a power traditionally reserved to the state, but not exclusively reserved to it, e.g., the common law shopkeeper's privilege, from cases in which a private actor exercises a power exclusively reserved to the state, e.g., the police power. Where private security guards are endowed by law with plenary police powers such that they are *de facto* police officers, they may qualify as state actors under the public function test. *See Payton,* 184 F.3d at 630; *Henderson v. Fisher,* 631 F.2d 1115 (3d Cir.1980) (*per curiam* ) (university policemen with plenary police authority throughout the

university's campus); *Rojas v. Alexander's Dept. Store, Inc.*, 654 F.Supp. 856 (E.D.N.Y.1986) (New York City special patrolman with plenary police authority patrolling a department store). The rationale of these cases is that when the state delegates a power traditionally reserved to it alone -- the police power – to private actors in order that they may provide police services to institutions that need it, a "plaintiff's ability to claim relief under § 1983 [for abuses of that power] should be unaffected." *Payton*, 184 F.3d at 629; *cf. Henderson*, 631 F.2d at 1118.

On the other side of the line illustrated by *Payton* are cases in which the private defendants have some police-like powers but not plenary police authority. *See Wade*, 83 F.3d at 906-907; *Johnson v. LaRabida Children's Hospital*, 372 F.3d 894, 896-97 (7th Cir.2004) (hospital security guards who had authority to patrol and eject people but not to carry guns and who had to call the police if someone became hostile and belligerent). A subset of these cases are cases in which a private institution's security employees have been dispatched to protect the institution's interests or enforce its policies. The canonical example here is when a store avails itself of the common law shopkeeper's privilege, the privilege at issue in this Court's *en banc* decision in *Chapman v. Higbee Co.*, and the Fifth Circuit case upon which *Chapman* relied. *See Chapman*, 319 F.3d at 833-34 (discussing *White v. Scrivner Corp.*, 594 F.2d 140, 142 (5th Cir.1979)).

Like the district court, we think this case falls on the *Payton* side of the line. It is undisputed that Brown (and some of her colleagues) were private security police officers licensed under M.C.L. § 338.1079. This means that Brown's qualifications for being so licensed were vetted by Michigan's department of state police, *id.* § (1), and that Brown was subject to certain statutes administered by that department. *Id.* § (2); *see* M.C.L. §§ 338.1067, 338.1069. More critical for present purposes are the undisputed facts that Brown was on duty and on the casino's premises at all times relevant to this case. These undisputed facts lead to an inescapable

conclusion of law – namely, that at all times relevant to this case, Brown "ha[d] the authority to arrest a person without a warrant as set forth for public peace officers ...." M.C.L. § 338.1080. One consequence of Brown's possession of this authority, the authority to make arrests at one's discretion and for any offenses, is clear: at all times relevant to this case, Brown was a state actor as a matter of law.[2]

Unlike the common law privileges at issue in *Wade* (the use of deadly force in self-defense, the right to detain for trespass, and the right to carry a weapon) and *Chapman* (the

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[2] The dissent's repeated reliance on *City of Grand Rapids v. Impens*, 414 Mich. 667, 327 N.W.2d 278 (1982), is misplaced. There, private security officers suspected the defendant and two others of shoplifting. *Id.* at 279. The officers *asked* the three individuals to come to the security office. *Id.* The officers searched the three and found merchandise on one of the other individuals. *Id.* The officers then elicited information from the defendant to complete a "Loss Prevention Department Voluntary Statement." *Id.* The officers read the statement to the defendant and asked the defendant to sign it, which he did. *Id.* "There was no indication that defendant would not be released if the statement were not signed." *Id.* Prior to his trial, the defendant moved to suppress the signed statement, arguing that it was obtained in violation of *Miranda*. *Id.* The Michigan Court held that the private security officers were not required to give *Miranda* warnings. *Id.* at 282.

One obvious distinction between the instant case and *Impens* is that *Impens* did not involve an arrest in any form. There, the defendant was not held against his will. He was asked to go to the security office; he was asked to sign a form. There was no indication of arrest.

The key distinction, however, is that the security officers did not exercise power exclusively reserved to the states. The contested conduct was the security officers' elicitation of the defendant's statements. Simply put, asking questions in a non-custodial setting is a power not within the exclusive province of the state.

shopkeeper's privilege), which may be invoked by any citizen under appropriate circumstances, the plenary arrest power enjoyed by private security police officers licensed pursuant to M.C.L. § 338.1079 is a power traditionally reserved to the state alone.[3] *See Payton,* 184 F.3d at 630; *Henderson,* 631 F.2d at 1118; *Rojas,* 654 F.Supp. at 858; *Thompson v. McCoy,* 425 F.Supp. 407, 409-10 (D.S.C.1976). *See also United States v. Hoffman,* 498 F.2d 879, 881 (7th Cir.1974) (holding that private railroad police possessing the same powers as public police officers were state actors). *Cf. Screws v. United States,* 325 U.S. 91, 109- 10, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (observing that one has the power to arrest only when one is "clothed with the authority of state law") (citation omitted); *Rodriguez v. Smithfield Packing*

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[3] The dissent misinterprets this Court's language with respect to the phrase "plenary arrest power." We agree with the dissent that under Michigan law, a licensed private security officer has a power of arrest equivalent to that held by a public police officer only on the property of her employer and only during her work hours. The Court has never contended that M.C.L. § 338.1080 gives a private security officer the power to make warrantless arrests wherever and whenever she pleases.

Instead, a licensed private security officer's arrest power is plenary in the sense that while on her employer's property during her working hours, a private security officer can make warrantless arrests to the same extent as a public police officer. The instant case closely resembles *Henderson,* a case where the court found state action when the state delegated to university police officers a full power of arrest limited to campus property. 631 F.2d at 1118 (citing 71 PA. STAT. ANN. § 646).

In contrast, the private security officers in *Wade* only had the power to "arrest people for criminal trespass ...." 83 F.3d at 906. As the Seventh Circuit later pointed out, the private security officers in *Wade* would have to "dial 911" if they witnessed a crime other than criminal trespass. *Payton,* 184 F.3d at 630. Under Michigan law, a private security officer has no such limitation.

*Co., Inc.*, 338 F.3d 348, 355 (4th Cir.2003) (observing that "the police function is 'one of the most basic functions of government' " and "an arrest is 'the function most commonly associated with the police' ") (quoting *Foley v. Connelie*, 435 U.S. 291, 297, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978)).

Defendants contend that *Wade* ought to control here because, as in that case, private security police officers' power to make arrests is subject to spatial or geographic limits. *See* M.C.L § 338.1080. But the spatial or geographic limitation in *Wade* was profound – it prohibited housing authority security guards from exercising their (already minimal) powers anywhere except in the lobbies of buildings operated by the housing authority. *See Wade*, 83 F.3d at 906. By contrast, § 338.1080 invests private security police officers with full arrest authority on the entirety of their employer's premises, which makes this case distinguishable from *Wade* and similar to *Payton* and *Henderson*, each of which involved a statute or ordinance that imposed or contemplated some spatial or geographic limits on the private defendants' police powers. *See Payton*, 184 F.3d at 625 (special police officers "shall possess the powers of the regular police patrol *at the places for which they are respectively appointed* ") (emphasis added) (citation omitted); *Henderson*, 631 F.2d at 1117-19 (authority of the university police was limited to the university campus in question). Furthermore, as we have discussed, private security police officers in Michigan are endowed with plenary arrest authority, *see* § 338.1080, while the defendant in *Wade* was permitted to exercise only what were in effect citizens' arrests. *Wade*, 83 F.3d at 906; *see also Payton*, 184 F.3d at 629-30.

Finally, we address Defendants' repeated representation that, although empowered to make arrests under § 338.1080, Brown and the other casino employees licensed under the statute are, as a matter of casino policy, not permitted to exercise this statutory authority to effectuate arrests. For this argument Defendants again rely on *Wade*, in which the very

document that was the source of the defendant's police-type powers, his contract with the public housing authority, at the same time imposed profound limits on those powers. *See Wade*, 83 F.3d at 905-906. Here the source of Brown's power to make arrests is a statute that includes no qualitative limits on that power, so *Wade* is inapplicable. Defendants do not cite a case in which a private security officer licensed to make arrests as under § 338.1080 was held not to be a state actor on the ground that the officer's employer substantially circumscribed the arrest power conferred on the officer by having been licensed. The only arguable support we have found for Defendants' argument is the concurring opinion in *Payton*, in which Judge Ripple opined that while for pleading purposes the plaintiff's claim of state action was viable, it might ultimately fail because "[f]urther development of the record might well establish ... that the guards' responsibilities were significantly circumscribed by their employer and that they performed well-defined functions quite narrow in scope ...." 184 F.3d at 634 (Ripple, J., concurring).

In this case, whatever development of the record occurred did not reveal circumscriptions of Brown's authority, let alone circumscriptions of the sort contemplated by Judge Ripple in *Payton*. Indeed, it is noteworthy that Defendants did not even make this argument at the summary judgment stage of the proceedings, arguing instead that while Brown and some of her colleagues *do* have the power to make arrests, Brown did not use it in this case. It is not surprising then, that in their brief to this Court, Defendants do not offer a single citation to the record in support of the contention that Brown's arrest authority was substantially circumscribed. Furthermore, the jury found that Defendants had in fact arrested Romanski and this aspect of the judgment is not on appeal (Defendants' jury instruction claim goes to whether probable cause existed, not whether an arrest occurred). Under these circumstances, we decline Defendants' invitation to look past § 338.1080's express grant of plenary arrest authority to private security police officers. We similarly find

unpersuasive the representation made on appeal that Brown was not acting pursuant to her § 338.1080 authority when she initiated the unlawful arrest of Romanski, but rather was merely protecting the casino's self-interest – conduct, Defendants maintain, that was more in the nature exercising the shopkeeper's privilege. *See, e.g., Chapman,* 319 F.3d at 833-34. Quite apart from the question whether Michigan's version of the shopkeeper's privilege even applies to casinos (see M.C.L. § 600.2917 and our discussion in the next section) there is no evidence in the record that could support the self-protection narrative Defendants urge us to adopt. Indeed, all of the evidence was to the contrary: Brown was employed by the casino as a private security police officer and was on duty in that capacity when she initiated the detention of Romanski.

Consistent with the Seventh Circuit's approach in *Wade* and *Payton,* we have focused on the specific powers that Brown, in her capacity as an on-duty and duly licensed private security police officer, had at her disposal. *See Payton,* 184 F.3d at 629-30; *Wade,* 83 F.3d at 905-906. Because at least one of these powers, the plenary arrest power, is "traditionally the exclusive prerogative of the state," *Jackson v. Metropolitan Edison Co.,* 419 U.S. at 353, 95 S.Ct. 449, and because it is undisputed that Brown was in fact duly licensed under M.C.L. § 338.1079 and was in fact on duty at all times relevant to this case, the district court correctly held that Brown was a state actor as a matter of law.[4]

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[4] We are aware that in contrast to the district court's conclusion below and our holding in this opinion, two other district courts in the Eastern District of Michigan have concluded in similar cases that private security police officers employed by the casino were not acting under color of state law. *Smith v. Detroit Entertainment L.L.C.,* 338 F.Supp.2d 775 (E.D.Mich.2004); *Lindsey, et al. v. Detroit Entertainment L.L.C.,* Slip. Op., No. 03-CV-71129 (E.D.Mich. Oct. 14, 2004) (unpublished). Both cases have been appealed to this Court and briefing was held in abeyance pending our decision in this case. We have reviewed the respective district courts' analysis of the state action question in those

B. Jury Instructions

Defendants also contend that two of the district court's jury instructions were erroneous. We must "review jury instructions as a whole to determine if they adequately inform the jury of the relevant considerations and 'provide a basis in law for aiding the jury in reaching its decision.' " *Argentine v. United Steelworkers of America, AFL-CIO*, 287 F.3d 476, 484 (6th Cir.2002) (quoting *Jones v. Consolidated Rail Corp.*, 800 F.2d 590, 592 (6th Cir.1986)). Accordingly, we will reverse a jury verdict on account of instructional error "only in situations where the instruction, viewed as a whole is 'confusing, misleading, and prejudicial.' " *Id.* (quoting *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 822 (6th Cir.2000)). Applying these standards, we find no error with respect to the two instructions at issue in this appeal.

The first instruction to which Defendants object related to whether they had probable cause to arrest Romanski. Defendants apparently argued that they had probable cause to believe Romanski had stolen the five cent token from the casino, i.e., that the token was not abandoned when Romanski took it into her possession. Although the district court did conclude at the summary judgment stage that there was a bona fide jury question as to whether the token was abandoned, it nevertheless observed "that there is no other likely explanation for the token being in the tray of the slot machine." 265 F.Supp.2d at 845. The district court's statement is an apt reflection of the record, which contains not even a scintilla of evidence supporting Defendants' contention that the token was the casino's property rather than abandoned by a prior player at the slot machine. Nor did Defendants come forward with a basis in Michigan law for their assertion that the token became the casino's property once the prior player departed. The general rule, as noted by

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cases and, for the reasons stated in this opinion, do not find either opinion persuasive on that point.

the district court, is that playing a slot machine is the commencement of an aleatory contract between the player and the casino. In the event the player wins a round, the casino "loses its legal right to the property, and the [player] gains that right." 265 F.Supp.2d at 845 (citing Restatement (Second), Contracts § 232 cmt. c (1981)).

Against this backdrop, we cannot say the district court erred when it instructed the jury that:

> This case, as we all know, involves a token, a five cent token. The plaintiff as the finder of a lost or abandoned token, has superior title to that token than does the Motor City Casino. In determining whether the token was lost or abandoned, you are to use your common sense and consider whether there was any other rational circumstance for that token to be in that tray. The only person who has a superior right to that token other than the plaintiff, is the person who lost it or the person who abandoned it.

We must also note the patent insignificance of a five cent token. Assuming for the moment that Defendants genuinely suspected Romanski of theft (it appears from the record that the real motive for the poor treatment of Romanski may have been her "attitude"), Defendants' decision to deal with the situation by dispatching a team of security personnel – at least one of whom was in effect a police officer – to detain and interrogate Romanski offends the "venerable maxim *de minimis non curat lex* ('the law cares not for trifles')." *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231, 112 S.Ct. 2447, 120 L.Ed.2d 174 (1992) (citing cases). Under the circumstances of this case, the district court's instruction on abandonment was not confusing, misleading, or prejudicial. *See Argentine*, 287 F.3d at 484.

Defendants' second jury instruction claim relates to two instructions it proposed but the district court rejected.

Defendants first requested the district court to instruct the jury that "[a] private business owner has the right to protect its business interests and property and may detain a patron suspected of theft." The district court declined to adopt this proposed instruction on the ground that the authority cited by Defendants in support of it related only to the common law shopkeeper's privilege to detain a patron suspected of theft – a privilege, the district court reasoned, that Michigan law does not extend to casinos.

This proposed instruction was not material to an issue in the case. The jury was instructed that Romanski's false arrest claim depended on proof that some legal justification (usually probable cause) for the detention was lacking, *see Lewis v. Farmer Jack Div., Inc.*, 415 Mich. 212, 327 N.W.2d 893, 894 (1982); and, similarly, that her § 1983 claim depended on proof that probable cause was lacking. The shopkeeper's right to detain suspected thieves, assuming for the moment that it applies to casinos, is a cognizable defense only where there is probable cause that a theft occurred. M.C.L. § 600.2917(1) (the codification of Michigan's shopkeeper privilege). Were it otherwise, shopkeepers who invoked the privilege would be insulated from liability for false arrest. In short, contrary to Defendants' requested instruction, neither shopkeepers nor casino proprietors enjoy an absolute privilege to detain patrons. It is clear, therefore, that the district court's instructions on probable cause and false arrest properly explained the crux of any self-protection privilege the casino might enjoy. To the extent that Defendants proposed the right-to-detain instruction in connection with the state action question, we have already held that in this case the casino employed Brown in her capacity as an on-duty private security police officer, not as a security guard charged merely with protecting the casino's property.

The second instruction sought by Defendants – an instruction to the effect that Michigan permits a casino to eject a patron for any reason it deems necessary – was likewise immaterial to the issues in the case; we have no

trouble, therefore, concluding that the district court properly rejected it. The gravamen of Romanski's claim for relief is not that she was ejected but rather that she was arrested without probable cause, which is why she sued for false arrest and unlawful arrest, the latter under § 1983. Accordingly, Romanski's claim for relief goes principally to Defendants' treatment of her before she was ejected from the casino; and, it must be remembered, it is that conduct alone for which the jury held Defendants liable. We see no error in the district court's decision to reject this proposed instruction.

C. Amount of the Punitive Damages Award

The casino appeals the jury's assessment of $875,000 in punitive damages against it on the ground that the amount is unconstitutionally excessive. Whether a punitive damages award is so excessive as to offend due process depends on our assessment of the three "guideposts" first enunciated in *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996): the degree of reprehensibility of the defendant's conduct, the punitive award's ratio to the compensatory award, and sanctions for comparable misconduct. *Id.* at 576-84, 116 S.Ct. 1589. We conduct "*de novo* review of a trial court's application of [these guideposts] to the jury's award." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 418, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001)). As the Supreme Court recently said: "Exacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *Id.* (internal quotation marks and citation omitted); *see Gore,* 517 U.S. at 587, 116 S.Ct. 1589.

1. Reprehensibility

The Supreme Court has said that "[t]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Campbell,* 538 U.S. at 419, 123 S.Ct. 1513 (quoting *Gore,*

517 U.S. at 576, 116 S.Ct. 1589). We must "determine the reprehensibility of a defendant" by considering whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

*Id.* (citing *Gore,* 517 U.S. at 576-77, 116 S.Ct. 1589). Merely because one of these factors is satisfied in a given case does not mean the punitive damages award is constitutionally unassailable; however, "the absence of all of them renders any award suspect." *Id.* In conducting our review of the punitive damages award, we must presume that a plaintiff's compensatory award made her whole for her injuries. *Id.* Consistent with the well-established purpose of punitive damages, *see Gore,* 517 U.S. at 568, 116 S.Ct. 1589 (citing cases), such damages "should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Campbell,* 538 U.S. at 419, 123 S.Ct. 1513.

In conducting its reprehensibility analysis, the district court concluded that the harm caused by the casino "was primarily physical, rather than economic." The basis for this conclusion was the fact that Romanski "testified that she felt sick, embarrassed, humiliated, intimidated and scared." Romanski's economic losses totaled $9.05, the combined value of the lunch ticket revoked by the casino ($9) and the five-cent token the casino seized. The remaining $270 of the compensatory award was to make Romanski whole for the emotional distress she suffered as a result of Defendants' conduct. We think the district court was generally correct to describe Romanski's harm as primarily physical in character.

Although she did not suffer actual physical injury, the jury could reasonably infer from the peculiar circumstances of Romanski's detention and questioning -- a process initiated on the casino floor in front of patrons by a team of four security personnel – that the threat of physical force was apparent. Indeed, there was testimony that Brown threatened Romanski and it is undisputed that Brown had handcuffs at her disposal; in addition, it appears undisputed, so far as we can discern, that Brown and perhaps another member of the security staff accused Romanski of theft. In sum, we agree with the Second Circuit's conclusion in a similar case that a defendant's conduct can be highly reprehensible without being actually violent. *See Lee v. Edwards,* 101 F.3d 805, 810 (2d Cir.1996) (although the defendant police officer did not use force in maliciously prosecuting the plaintiff, the defendant's invocation of state power to deprive the plaintiff of his rights presented "an element of real and threatened force that could have aroused the jury").

More important than the harm Romanski suffered, that harm being of such a type that the label "physical" rather than "economic" befits it, is the fundamental nature of Defendants' conduct in this case. As we indicated at the outset, Defendants treated Romanski in an inexplicable and egregious way. Indeed, on this record a jury could reasonably infer that Brown acted with "intentional malice" and not "mere accident." *Campbell,* 538 U.S. at 419, 123 S.Ct. 1513. This is not a case of mistaken identity, nor one in which a law enforcement officer reasonably misread the circumstances. Defendants admit that Romanski was targeted because she picked up a five cent token. Whether Brown subsequently detained Romanski on suspicion of theft or because Romanski's "attitude" perturbed Brown, the crucial point for reprehensibility purposes is that the detention itself and the manner in which it was carried out – e.g., by a team of four security personnel surrounding Romanski – were so egregious in light of the circumstances that malice naturally comes to mind. What other motivation, a reasonable observer might

ask, would cause Brown and her colleagues to detain and interrogate a 72-year-old woman in a windowless room over five cents? This is especially true in light of the jury's conclusion that Defendants lacked probable cause to arrest Romanski. *See Stamathis v. Flying J, Inc.*, 389 F.3d 429, 443 (4th Cir.2004) ("[A]s to the reprehensibility of the act, we cannot ignore that the jury found that the defendants did not have probable cause."); *Williams v. Kaufman County*, 352 F.3d 994, 1015 (5th Cir.2003) (observing that a strip search obviously conducted without probable cause evidenced "reckless indifference toward the constitutional rights of plaintiffs" and hence was strong evidence of reprehensibility). The fact that the Defendants *knew* that the casino's own patrons had not been provided with notice of the slot-walking prohibition only makes the Defendants' conduct more reprehensible.

But Defendants' remarkable abuse of power did not end there. It is undisputed that the casino revoked Romanski's lunch ticket and, having been ejected, she was not permitted to eat anywhere in the casino. In other words, the rather inhospitable outside (it was humid and over 90 degrees) was the 72- year-old Romanski's only choice for lunch. It is further undisputed that Defendants refused to allow Romanski to enter the restroom by herself; instead, Defendants callously forced her to endure the indignity of having Brown stand guard outside the stall. This is without question evidence of malice and of a conscious disregard for Romanski's well-being and hence is probative of reprehensibility. *Cf. Gore*, 517 U.S. at 575, 116 S.Ct. 1589; *Campbell*, 538 U.S. at 419, 123 S.Ct. 1513. Finally, we must note one facet of the casino's behavior that is particularly deserving of condemnation and further indicative of malice, namely, that it dispatched someone who was in effect a police officer, with all the authority that that implies. Apparently, the casino was not content to have an ordinary security guard – one without the power to make arrests – simply inform Romanski of the purported slot-walking policy and leave it at that. There is,

consequently, a troubling element of gratuitousness in Defendants' conduct.

In closing our discussion of reprehensibility, we find it appropriate to quote the district court again, this time from its opinion denying Defendants' motion for a new trial or a remittitur: "[T]his case was not about the loss of a five-cent token or a nine-dollar meal ticket; it was about [Romanski's] right not to be unreasonably seized [and] unreasonably detained .... Defendants acted with at least indifference to the health or safety of [Romanski], an elderly woman. After Defendant Brown observed [Romanski] play the five-cent token, [Romanski] was surrounded by four security guards, led up to the security office, informed she had committed a crime, photographed, and reported to the state police .... [T]he Court finds the conduct of Defendant MotorCity's employees to be particularly reprehensible."

In sum, while there is no evidence of similar misconduct in the past on the casino's part, *see Gore,* 517 U.S. at 576-77, 116 S.Ct. 1589; *Campbell,* 538 U.S. at 422-23, 123 S.Ct. 1513, it is clear in this case that the reprehensibility guidepost weighs in favor of a substantial punitive damages award.

2. Ratio

"The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *Gore,* 517 U.S. at 580, 116 S.Ct. 1589 (citations omitted). When considered against the broad spectrum of civil cases, the ratio in this case (3,135 to 1) is unusually high and the compensatory damages award is unusually low. *Compare Gore,* 517 U.S. at 580-81, 116 S.Ct. 1589 (rejecting a 500-to-1 ratio where the compensatory award was $4000); *Campbell,* 538 U.S. at 425-26, 123 S.Ct. 1513 (rejecting a 145-to-1 ratio where the compensatory award was $1 million). But this is a § 1983 case in which the basis for the punitive damages award was the plaintiff's unlawful arrest and the plaintiff's economic injury was so minimal as to be

essentially nominal. The Supreme Court's cases on the ratio component of the excessiveness inquiry – which involved substantial compensatory damages awards for economic and measurable noneconomic harm[5] – are therefore of limited relevance. *See Lee,* 101 F.3d at 810-12.

This Court and other courts have recognized that where "injuries are without a ready monetary value," such as invasions of constitutional rights unaccompanied by physical injury or other compensable harm, higher ratios between the compensatory or nominal award and the punitive award are to be expected. *Argentine v. United Steel Workers of Am., AFL-CIO, CLC,* 287 F.3d 476, 488 (6th Cir.2002) (sustaining a 42.5 to 1 ratio, and thus a $400,000 punitive award, where injury was a national union's sustained campaign of retaliation against a local branch because some of its members expressed disagreement with a union-promoted bargaining agreement); *see also Dean v. Olibas,* 129 F.3d 1001, 1007 (8th Cir.1997) (sustaining a 14 to 1 ratio, and thus a $70,000 punitive award, where the unlawful arrest of the plaintiff caused him primarily a kind of harm not measurable in monetary terms). Indeed, the Second Circuit has reasoned, we think correctly, that in cases where the compensatory award is very low or nominal, "*any* appreciable exemplary award would produce a ratio that would appear excessive by this measure." *Lee,* 101 F.3d at 811; *see also Fabri v. United Technologies Intern., Inc.,* 387 F.3d 109, 126 (2d Cir.2004); *DiSorbo v. Hoy,* 343 F.3d 172, 187 (2d Cir.2003). The Fifth Circuit also adheres to this uncontroversial view. *See Williams,* 352 F.3d at 1016.

These decisions in the circuits are based as much on intuition as on the only plausible interpretation of crucial

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[5] *See Gore,* 517 U.S. at 565, 116 S.Ct. 1589 (a $4000 compensatory damages award for depreciation to a car's value due to an undisclosed re-painting performed by the manufacturer); *Campbell,* 538 U.S. at 415, 123 S.Ct. 1513 (a $1 million compensatory damages award for economic harm and emotional distress).

dicta in *Gore* and *Campbell;* to wit, as the Court said in the first of those cases: "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Gore,* 517 U.S. at 582, 116 S.Ct. 1589. Read in conjunction with the Court's consistent "rejection of a categorical approach" to evaluating the constitutionality of punitive damages awards, *id.; Campbell,* 538 U.S. at 425, 123 S.Ct. 1513, these pronouncements about the effect, in appropriate cases, of a low or nominal compensatory award on the excessiveness inquiry are weighty indeed. *See, e.g., Argentine,* 287 F.3d at 488; *Lee,* 101 F.3d at 811.

Consistent with these principles, we think that to determine whether the punitive award in this case is within constitutional limits, the best approach is to compare it to punitive awards examined by courts "in other civil rights cases to find limits and proportions." *Lee,* 101 F.3d at 811; *see also DiSorbo,* 343 F.3d at 189; *Williams,* 352 F.3d at 1016 n. 78. This approach is necessarily unscientific but aids us in identifying a ballpark within which to evaluate the $875,000 award at issue here.

We know of only one prior case in which we considered the constitutionality of a punitive damages award assessed pursuant to a finding of liability under § 1983. The case, *Gregory v. Shelby County,* is quite distinguishable, however, because the plaintiff "suffered severe physical abuse, endured long hours of conscious pain and suffering, and ultimately died as a result [of a police officer's] actions." 220 F.3d 433, 445 (6th Cir.2000). Furthermore, the compensatory award in *Gregory* was $778,000, so the $2.2 million punitive award easily satisfied *Gore*'s ratio guidepost. *Id.* We turn, then, to other courts' treatment of punitive awards in civil rights cases.

In *Lee v. Edwards*, the plaintiff was awarded nominal compensatory damages and the Second Circuit concluded that the malicious prosecution verdict against the defendant, a police officer, would support a punitive damages award of no more than $75,000; the jury had awarded $200,000. 101 F.3d at 813. The basis for the court's conclusion was that it had closely scrutinized but ultimately approved awards of substantially less than $200,000 in cases where the plaintiffs suffered "numerous and severe physical and psychological harms." *Id.* The defendant's conduct in *Lee*, not having caused the plaintiff such acute trauma, was not "remotely" as reprehensible. *Id.* In the later case of *DiSorbo v. Hoy*, the Second Circuit remitted a punitive damages award of $1.275 million to $75,000; the claims were excessive force and abuse of process. It was clear in *DiSorbo* that the plaintiff was severely beaten by the defendant police officer – the Second Circuit described the case as involving "heinous acts of police aggression" – who arrested her and her sister because she resisted his advances. 343 F.3d at 188-89.

In *Dean v. Olibas*, the Eighth Circuit sustained a $70,000 punitive award against a bail bondsman after the jury found him liable for causing the police to wrongfully arrest and book the plaintiff. 129 F.3d at 1007-1008. A key component of the *Dean* court's rationale was its concern that, as a bail bondsman, the defendant might "have other opportunities to knowingly initiate the arrest of innocent people" and cause them to suffer the indignity of detention in jail and prosecution. *Id.* Finally, in *Williams v. Kaufman County*, the Fifth Circuit sustained a $15,000 per-plaintiff punitive award against a police officer for having conducted illegal strip searches of the plaintiffs. 352 F.3d at 1016. The award satisfied *Gore* scrutiny, the court concluded, because it was "not unreasonable in light of the violations that took place" and in light of awards in similar cases. *Id.*

Our decision in *Gregory* and our review of these cases from other circuits leads us to two important conclusions: First, substantial punitive awards in § 1983 cases, not

surprisingly, tend to accompany conduct that results in physical or psychological harm. Second, in the typical § 1983 case in which punitive damages are awarded, the defendant is an individual police officer, not the police department or municipality (which, odds are, have deeper pockets than the officer), let alone a deeply pocketed company, which the casino indisputably is. We have not found a case in which punitive damages were awarded based exclusively on a finding that the defendant unlawfully arrested the plaintiff and the award was challenged as unconstitutionally excessive. In addition, while we have said that the unlawful arrest of Romanski and the manner in which Defendants treated her are sufficiently reprehensible to warrant a substantial punitive damages award, the harm that befell Romanski is not as severe as the harm suffered by the plaintiffs in the cases just discussed (e.g., being severely beaten, strip-searched, or subjected to booking, jailhouse detention, and wrongful prosecution).

Nevertheless, a wrinkle peculiar to this case may render appropriate an award that exceeds the average punitive award for civil rights cases involving verdicts of this type. The defendant here is a casino, which, at the time of the verdict, yielded a daily intake of nearly $1,000,000. "Since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of [the defendant's financial position] to the State's interest in retribution ...." *Gore,* 517 U.S. at 591, 116 S.Ct. 1589 (Breyer, J., concurring); *see TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 462 & n. 28, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (plurality opinion); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 21-22, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). The defendant's financial position is equally relevant to the State's interest in deterrence, which is also a valid purpose of punitive damages. *Haslip,* 499 U.S. at 21-22, 111 S.Ct. 1032; *Lee,* 101 F.3d at 813 (citation omitted).

At the same time, a defendant's wealth could heighten the likelihood of juror caprice. Thus the Supreme Court recently reiterated that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Campbell*, 538 U.S. at 427, 123 S.Ct. 1513 (citation omitted). Common sense gives us an additional reason to view skeptically the generic proposition that a high punitive award is necessary because of the wealth of the defendant. The Supreme Court said in *Gore* that "[t]he sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal." 517 U.S. at 584, 116 S.Ct. 1589. The upshot is two-fold: we must take into account the casino's wealth to ensure that the punitive damages award will further the interests it is designed to advance; but we must also ensure that our exacting appellate review results in an award that is not significantly higher than is necessary to further those interests.

Before proceeding to the third *Gore* guidepost, we take a final stab at putting the $875,000 punitive damages award in context. *See Lee*, 101 F.3d at 811. We have reviewed one roughly analogous case in which a state court examined a substantial punitive award levied against a corporate defendant for conduct roughly similar to what occurred here. In that case, the plaintiff, a pregnant woman shopping on Christmas eve with her two children, brought a malicious prosecution claim against Wal-Mart after she was wrongly accused of shoplifting a telephone, detained briefly at the store, arrested by the police, charged for theft, jailed, and tried, all at Wal-Mart's behest. *Wal-Mart Stores, Inc. v. Goodman*, 789 So.2d 166, 171 (Ala.2000). A jury awarded the plaintiff $200,000 in compensatory damages for mental anguish and $3 million in punitive damages, the latter because it was clear that Wal-Mart could have taken steps that would have quickly exonerated the plaintiff. *Id.* at 173. The Supreme Court of Alabama concluded that *Gore* permitted a

punitive-compensatory ratio of no greater than 3-to-1 on the ground that Wal-Mart's conduct, although it was reprehensible, did not cause the plaintiff physical injury. *Id.* at 181. Accordingly, the post-remittitur punitive award was $600,000. The *Goodman* case is not directly on-point - it involved conduct of a different character than that which occurred here and a substantial compensatory award – but it nevertheless assists us in completing the backdrop against which to evaluate the size of the punitive damages award assessed against the casino.

3. Sanctions for Comparable Conduct

"Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." *Gore,* 517 U.S. at 583, 116 S.Ct. 1589. The purpose of this guidepost reflects an elementary principle of due process – namely, that the defendant must have been provided "fair notice" that its conduct would subject it to a penalty on the order of the punitive damages award. *Id.* at 584, 116 S.Ct. 1589; *Campbell,* 538 U.S. at 428, 123 S.Ct. 1513. Notice of possible penalties is not to be confused with notice of the unlawfulness of the underlying conduct; the latter is irrelevant to the constitutionality of a punitive damages award. *Gore,* 517 U.S. at 580, 116 S.Ct. 1589; *DiSorbo,* 343 F.3d at 186; *Lee,* 101 F.3d at 809.

We have already canvassed the most comparable cases we have found; indeed, this case is an occasion where the ratio and comparable conduct guideposts substantially overlap. Still, the question here is not whether similar punitive awards for similar conduct were held constitutional in prior cases but whether the casino had fair notice that conduct of the sort that occurred here might result in penalties, fines, or punitive damages on the order of $875,000. *See Campbell,* 538 U.S. at 428, 123 S.Ct. 1513; *Gore,* 517 U.S. at 584, 116 S.Ct. 1589. The parties do not address whether Defendants' conduct might have implicated

any Michigan civil or criminal penalties such that Defendants would have been on notice of specific penalties. We note that the district court concluded that the unlawful arrest of Romanski would not have subjected Brown or the casino to any specific statutory civil or criminal penalties. We take no issue with this account in light of the parties' silence on the question.

In a general sense, of course, the casino had fair notice that a verdict against a state actor for violating someone's constitutional rights might result in a punitive damages award if the conduct is sufficiently egregious. *See Smith v. Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). The civil rights cases we canvassed, therefore, provided some notice as to potential punitive damages awards for § 1983 liability. Accordingly, we conclude the casino had fair notice that it might face punitive damages for sanctioning the type of civil rights violation that Romanski endured here but it did not have notice that an award as high as $875,000 was likely. *See Campbell*, 538 U.S. at 428, 123 S.Ct. 1513; *Gore*, 517 U.S. at 584, 116 S.Ct. 1589. This guidepost militates in favor of reducing the award.

4. Conclusion

The lasting impression this case leaves is one of egregious misconduct – a *de jure* police officer's gratuitous abuse of power, sanctioned by a casino, that left a 72-year-old woman the victim of needless indignities and humiliation. In moral terms, the casino's conduct was significantly reprehensible; it surely was reprehensible enough to warrant a substantial punitive damages award. In comparative terms, however, because Romanski was not beaten, charged or tried, the conduct here was not as reprehensible as the defendants' conduct in some of the civil rights cases we have canvassed. In addition, the casino did not have fair notice that a verdict for unlawful arrest – unaccompanied by a verdict for assault, excessive force, or malicious prosecution, or proof of physical

injury or sustained psychological trauma – would result in a penalty on the order of $875,000.

However, we must consider the *Gore* guideposts in their totality and, furthermore, we must ensure that a punitive damages award actually achieves the twin purposes of punishment and deterrence. As the Second Circuit aptly put it in *Lee:* "In gauging excessiveness, we must keep in mind the purpose of punitive damages: 'to punish the defendant and to deter him and others from similar conduct in the future.' " 101 F.3d at 809 (citing *Vasbinder v. Scott,* 976 F.2d 118, 121 (2d Cir.1992)); *see also Gore,* 517 U.S. at 568, 116 S.Ct. 1589; *Haslip,* 499 U.S. at 21-22, 111 S.Ct. 1032. Furthermore, "deterrence is directly related to what people can afford to pay." *Lee,* 101 F.3d at 813 (citation omitted); *see also Gore,* 517 U.S. at 591, 116 S.Ct. 1589 (Breyer, J., concurring). Consequently, it was entirely appropriate for the jury to craft a punitive damages award that was sensitive to the casino's financial position. And we too must be sensitive to this reality in reviewing the award.

Under the totality of the circumstances, mindful that the Supreme Court has charged us with "considering whether less drastic remedies [than the jury's punitive damages award] could be expected to achieve" the State's goal of deterring future misconduct, *Gore,* 517 U.S. at 585, 116 S.Ct. 1589, *and* with ensuring that punishment and deterrence are achieved, we think an award of no greater than $600,000 – sixty per cent of the casino's daily intake at the time of the verdict – would satisfy the demands of the due process clause. It cannot be seriously contended that this is an insignificant amount for the casino.[6] Moreover, a $600,000 award is comfortably within the ballpark of the punitive damages awards in the civil rights cases we have canvassed, *see esp.*

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[6] We note that neither Romanski nor the district court considered *Gore*'s requirement that less drastic measures must be evaluated to ensure that the ultimate penalty imposed comports with due process.

*Goodman*, 789 So.2d at 171 (involving a corporate defendant); the less reprehensible conduct in this case being counteracted by the need to make the award large enough to actually punish and deter, something that is ordinarily not a challenge in civil rights cases.

Accordingly, on remand, the district court must give Romanski the option of agreeing to remit $275,000 and to accept a $600,000 punitive damages award or to proceed with a new trial on the issue of damages. *See Meyers v. Wal-Mart Stores, Inc.*, 257 F.3d 625, 636 (6th Cir.2001); *Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391, 1396 (6th Cir.1990); *Brewer v. Uniroyal, Inc.*, 498 F.2d 973, 976 (6th Cir.1974); *DiSorbo*, 343 F.3d at 189; *Lee*, 101 F.3d at 813.

## III. CONCLUSION

We VACATE the punitive damages portion of the district court's judgment, AFFIRM the judgment in all other respects, and REMAND for proceedings consistent with this opinion.

FARRIS, Circuit Judge, dissenting.

The Michigan statute upon which the majority relies places specific limitations on private security guards that distinguish their powers of detention from those of public peace-officers. *See* M.C.L. § 338.1080. Although security guards can make arrests without a warrant, M.C.L. § 338.1080 emphasizes that their authority is limited by the bounds of their *private employment:* They can only detain individuals on company property, during their hours of employment, while wearing a company uniform.[7]

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[7] The majority relies on the holdings in *Payton v. Rush-Presbyterian* and *Henderson v. Fisher* for the proposition that the geographical limitations on security guards' authority in M.C.L. § 338.1080 do not alter the "plenary" nature of their power. (Op. 647.) Those cases are distinguishable from this case. The Chicago ordinance cited in *Payton*

The Michigan Supreme Court has specifically rejected the majority's conclusion that licensed, private security guards are necessarily state actors. (Op. 645-46.)

> [D]efendant believes that the licensing statutes which regulate private security guards demonstrate the requisite degree of state action to bring their activities under color of state law, subject to constitutional restraints. We disagree. We do not believe that the mere licensing of security guards constitutes sufficient government involvement to require the giving of *Miranda* warnings. *City of Grand Rapids v. Impens*, 414 Mich. 667, 327 N.W.2d 278, 281 (1982).

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states that private officers "possess the powers of the regular police patrol at the places for which they are respectively appointed or in the line of duty for which they are engaged." *Payton v. Rush-Presbyterian*, 184 F.3d 623, 625 (7th Cir.1999). Unlike the Michigan statute, the Chicago ordinance grants special police officers broad police powers without specific geographical limitations. Moreover, the ordinance also forces special police officers to comply with all rules and regulations governing public officers and requires them to report directly to the superintendent of police. *Id.* Likewise, *Henderson v. Fisher* also differs significantly from this case. In *Henderson* the court held that the University of Pittsburgh, where the campus police worked, was essentially a state institution. *Henderson v. Fisher*, 631 F.2d 1115, 1118 (3d Cir.1980) ("[T]he University of Pittsburgh has lost its wholly private charter and has become an instrumentality of the Commonwealth ...."). Furthermore, the Pennsylvania statute cited in *Henderson* extends the authority of campus officers beyond the bounds of state universities, permitting them to "exercise those powers ... conferred pursuant to this section within the municipality for the limited purpose of aiding local authorities in emergency situations." 71 Pa. Stat. Ann. § 646 (2005). Due to M.C.L. § 338.1080's comparative limitations on the authority of private security guards, I believe this case is more akin to *Wade v. Byles*, than either *Payton* or *Henderson*. *See Wade v. Byles*, 83 F.3d 902, 904 (7th Cir.1996) (finding an absence of state action where guards were not allowed to pursue individuals outside the lobby of city housing authority buildings).

By its own account, in granting licenses to private security guards, the State of Michigan has not attempted to, "cloak[ ] private individuals with virtually the same power as public officers." *See Payton,* 184 F.3d at 629. But even if the casino's private security guards did hold plenary arrest authority under Michigan law, it would still be necessary to establish that they actually exercised this authority during the detention of Romanski.

In applying the public interest test, it is the exercise, and not the possession, of powers belonging exclusively to the state that determines whether the action was under color of state law. *See Chapman v. Higbee Co.,* 319 F.3d 825, 834 (6th Cir.2003) (en banc) ("Under the public function test, a private party is deemed a state actor if he or she exercised powers traditionally reserved exclusively to the state."); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n,* 531 U.S. 288, 302-03, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (holding that actions can only be attributed to the state if they were "exclusively and traditionally" public); *see also Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 158, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978) ( "[V]ery few [functions] have been 'exclusively reserved to the State.' " (citation omitted)).[8] Romanski has presented no evidence that the State of Michigan has traditionally and exclusively reserved the power to make warrantless arrests. To the contrary, the Michigan Supreme Court has held that licensed private security guards do not act as state actors in detaining shoplifting suspects.

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[8] While the Supreme Court has held that certain actions may be public even if they could have been undertaken in a private capacity, *see Griffin v. Maryland,* 378 U.S. 130, 135, 84 S.Ct. 1770, 12 L.Ed.2d 754 (1964); *West v. Atkins,* 487 U.S. 42, 56 n. 15, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988), these instances involve preventing a state from avoiding a constitutional duty by delegation, *see Georgia v. McCollum,* 505 U.S. 42, 53, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); *Wade,* 83 F.3d at 906, or an actor with parallel roles "purporting to act" in the state role, *see Flagg Bros.,* 436 U.S. at 163 n. 14, 98 S.Ct. 1729.

*Impens*, 327 N.W.2d at 281. ("Their [guards'] role may be viewed as an extension of the shopkeepers' privilege to detain for a reasonable period of time a person suspected of theft or failure to pay.").

Viewing the facts in the light most favorable to defendants, I am not convinced that the casino security guards acted under color of state law in detaining Romanski. The four security guards approached and then later escorted Romanski off-the-floor because they believed she had committed a crime and, as the guards contend, she had become loud and belligerent when they attempted to explain the casino's policy against "slot-walking." Even Romanski concedes that Brown detained her, not simply because of her attitude, but because she suspected Romanski of theft. (Op. 633-34.) The law on this point is very clear: Investigation of a possible crime on an employer's premises "does not transform the actions of a private security officer into state action." *Chapman*, 319 F.3d at 834. That the "crime" was a "trifle," as the opinion notes, and that the guard's actions may have constituted an egregious tort, is irrelevant.

As in *Chapman*, where a security guard conducted an unauthorized strip search of a female customer, the behavior of the casino security guards in this case was outrageous and abusive, but it was clearly meant to serve the interests of the employer. *Id.* The humiliating detention of Romanski was based solely on the enforcement of an inane casino policy and ultimately involved collection of personal data to prevent her from returning to the casino for six months. However, the security guards neither threatened nor actually invoked the authority of the state during the incident.[9]

Because the actions of the casino's security guards failed to constitute state action, I would dismiss Romanski's § 1983 claim. In the absence of subject-matter jurisdiction, I would

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[9] As the majority notes, the Michigan State Police were notified regarding Romanski's ejection. (Op. 635-36.)

remand her case to the district court with directions to vacate and remand to state court.

I respectfully dissent.

United States District Court,
E.D. Michigan,
Southern Division.

Stella ROMANSKI, Plaintiff,
v.
DETROIT ENTERTAINMENT, L.L.C. d/b/a MotorCity Casino, a Michigan Corporation,
Marlene Brown, Gloria Brown, Robert Edwards, and Joetta Stevenson, Jointly and Severally, Defendants.

No. 02-73358.

May 28, 2003.

Neil H. Fink, Birmingham, MI, for Plaintiff.

Robert F. MacAlpine, John B. Farrell, Garan Lucow, Detroit, MI, for Defendants.

OPINION AND ORDER

ZATKOFF, Chief Judge.

This matter is before the Court on Defendants' Motion for Summary Judgment. Plaintiff responded. The Court finds that the parties have adequately set forth the relevant law and facts, and that oral argument would not aid in the disposition of the instant motion. *See* E.D. MICH. LR 7.1(e)(2). Accordingly, the Court ORDERS that the motion be decided on the briefs submitted. For the reasons set forth herein, Defendants' Motion for Summary Judgment is DENIED.

I. BACKGROUND

Plaintiff's Second Amended Complaint was removed by the Defendants from the Wayne County Circuit Court on August 19, 2002. Her Second Amended Complaint contains the following four counts:

1. False Arrest and Imprisonment;
2. Defamation;
3. Intentional Infliction of Emotional Distress; and
4. Violation of 42 U.S.C. § 1983.[1]

Defendants filed a motion for summary judgment on these counts. The Court shall now describe the facts surrounding Plaintiff's action, and will then briefly describe the procedural history of this action.

A. Factual History

Ms. Stella Romanski, a grandmother of nine children, and her two friends, Ms. Dorothy Dombrowski and Ms. Linda Holman, enjoyed spending time together by periodically visiting casinos in the Detroit area. On August 7, 2001, Ms. Romanski, and her two friends took advantage of a promotion offered by Defendant MotorCity Casino.[2] Basically, for $9.00, MotorCity Casino, which is located near downtown Detroit, Michigan, offered to provide transportation to and from the casino, as well as a complementary lunch at the casino's Classic Buffet. In particular, in the morning, a casino bus would pick up patrons in Sterling Heights, Michigan – which is a suburb of Detroit – and would drive them to the casino. The patrons would then spend several hours in the casino, and, in the evening, a casino bus would return the patrons to Sterling Heights.

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[1] Plaintiff's Second Amended Complaint contained five "counts," however, one of her counts seeks "exemplary damages," which, by itself, is not a cause of action.

[2] "MotorCity" is the way that the casino's name appears in the documents submitted.

Ms. Romanski and her friends arrived at the casino late in the morning, roughly around 11:30 a.m. They had agreed to split up, however, they would meet each other for lunch at the buffet at 1:30 p.m. After they went their separate ways, Ms. Romanski headed towards the "nickel" slot machines. Over the course of the next hour, she primarily played at one machine. At about 12:30, she stood up, walked by some of the other slot machines in her area, and returned to the machine that she had been playing for the previous hour. While she was walking around, she noticed that there was a token worth five cents lying in the tray of an abandoned slot machine. She picked it up and took it with her. When she returned to the slot machine that she had been playing, she put a twenty-dollar bill into the machine, along with the five cent token. What happened next is subject to dispute.

Ms. Romanski alleges that she began playing the machine again; she testifies that she knew that she played it thirteen times because she counted her money when she returned home. While she was playing the machine, four security officers surrounded her, and asked to her to accompany them. The security officers, still surrounding her, led her to the casino's security office. When they got to the security office, Ms. Romanski was seated at a desk, and three female security officers surrounded her. One officer informed Ms. Romanski that she stole a coin from the slot machine tray, and that she committed a crime. Ms. Romanski began to cry at the thought that she, a grandmother of nine children, could commit a crime. The security officers made her cash out. After her money was counted, she had $14.10; the security officers gave her a ten-dollar bill, four one-dollar bills, and two nickels. A security officer, however, kept one of the two nickels; this way, the casino had recovered the money that was stolen from it.

Afterwards, the security officers took a photograph of Ms. Romanski, and photocopied her driver's license. A security officer also asked for Ms. Romanski's Social Security number; while Ms. Romanski was hesitant to

surrender such information at first, the security officer told Ms. Romanski that she was a "policewoman," afterwards Ms. Romanski surrendered the information. A few minutes later, a woman approached Ms. Romanski, and informed her that she was banned from the casino for six months, and that she had to leave. It occurred to Ms. Romanski that it was almost time for her to meet her friends for lunch, accordingly, she requested to at least have lunch with her friends; a security officer, however, denied that request, and informed Ms. Romanski that she had lost all of her rights, and that she was banned from the casino.

After Ms. Romanski was informed that she had to leave the casino, three security officers escorted her out of the casino. Ms. Romanski stated that she felt sick, and that she wanted to use the bathroom. While they let Ms. Romanski use the restroom, one of the female security officers followed her into the restroom, and then followed Ms. Romanski into her stall. After Ms. Romanski was done with the restroom, the security officers escorted her to the valet area. They pointed to an area some distance away, and stated that her bus would arrive there at 3:00 p.m.

After the security officers left, Ms. Romanski used a cellular telephone to contact her friends and inform them that she had been banned from the casino. Her friends thought it was a joke at first, and could not believe that Ms. Romanski would steal anything. Concerned, however, Ms. Holman and Ms. Dombrowski asked casino personnel if what Ms. Romanski told them was true. Sometime later, casino personnel informed Ms. Romanski's friends that Ms. Romanski was banned from the casino for theft.

Around 3:00, Ms. Romanski left the valet area and walked over to the area where she was told to go in order to wait for a bus to take her home. After she crossed Grand River Ave., and negotiated relatively heavy traffic, she discovered that it was not the proper bus, and that her bus would not arrive for another two hours. Because Ms.

Romanski was not allowed back into the casino, she had to wait outside on a hot day for the next bus to arrive.

A short time later, Ms. Romanski's two friends found her. The three women went back to the casino, and waited in the vestibule area in order to get out of the heat. Casino security officers noticed that Ms. Romanski had re-entered the casino; they approached the three women and informed them that Ms. Romanski was banned, and had to wait outside. In response, one of Ms. Romanski's friends, Ms. Dombrowski, stated that she thought that this was a "stupid" situation. One of the security officers took offense to the comment, and accused Ms. Dombrowski of calling the security officer stupid, and began to physically intimidate Ms. Dombrowski. The three women then left the casino again, and waited for the bus to take them back to Sterling Heights.

Defendants' account of the facts is different. Defendants state that a security officer, Defendant Marlene Brown, was working undercover, or in "plainclothes" on August 7, 2001. She noticed Ms. Romanski take a token worth a nickel out of the tray of a slot machine that she was not playing. She then saw Ms. Romanski prepare to play the token; Ms. Romanski placed the token in the slot machine, but before she had a chance to play it, Defendant Marlene Brown approached Ms. Romanski, and informed Ms. Romanski that she had taken casino property. Defendant Marlene Brown explained that the casino had a policy in which it considered money left in a tray of a slot machine to be casino property, and that Ms. Romanski had therefore taken casino property. In response, Ms. Romanski became hostile and raised her voice in objection. Defendant Marlene Brown, who was new at doing undercover security work, signaled to the other undercover security officers, Defendants Gloria Brown and Robert Edwards, that she needed assistance. When it appeared that Ms. Romanski was not going to calm down, they decided to take her to the security office; during her deposition, Defendant Marlene Brown stated: "Well, my instinct was to just tell her and let her just go finish gaming, okay, but like I

said, she was getting kind of loud, and that's when I called Sky[3], and that's when I called my partners. That's when I was instructed to bring her to the office." *See* Dep. of M. Brown, 65.

Defendants also state that after Ms. Romanski was taken to the security office, the decision was made to ban her from the casino largely because she continued to be hostile -- even belligerent. Indeed, Defendant Marlene Brown stated during her deposition that Ms. Romanski was banned from the casino "[b]ecause of her attitude," and not because she committed a "crime." *See id.* at 75. After she was banned, Ms. Romanski was led to the air-conditioned valet area, where she was allowed to remain until her bus arrived. Defendants state that Ms. Romanski freely chose to leave the valet area and wait outside in the heat. Defendants also state that after Ms. Romanski met with her friends, the three women decided to wait in the lobby of the casino until their bus arrived. When Defendant Marlene Brown approached to ask Ms. Romanski to leave, Ms. Romanski's friends began to yell at Defendant Marlene Brown and call her "stupid."

These are the disputed facts. The parties do not dispute the fact that the casino has a policy that states that tokens found in the trays of abandoned slot machines are considered casino property, and no one, except the person who won it, has a right to pick up such a token. If, however, a token is found on the floor, anyone can pick it up and keep it. In addition, it is not disputed that this policy is not made known to the public; there are no signs or other warnings posted in the casino to inform patrons of such a policy. It is this policy that is at the heart of the present dispute.

B. Procedural History

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[3] "Sky" refers to the casino's system of surveillance cameras. Despite the existence of security cameras in the casino, Defendants are not able to produce a video tape of the incidents at issue.

Plaintiff first filed her complaint in Wayne County Circuit Court on November 9, 2001. On August 19, 2002, the Wayne County Circuit Court granted Plaintiff leave to file her Second Amended Complaint. The most notable feature about Plaintiff's Second Amended Complaint is that it added a claim under 42 U.S.C. § 1983. Defendants removed to this Court on August 19, 2002.

On September 4, 2002, the Court ordered the parties to Show Cause as to why Plaintiff's claim under 42 U.S.C. § 1983 should not be dismissed, and Plaintiff's state law claims should not be remanded. In particular, the Court noted that a defendant must act under the color of state law to be held liable under § 1983, and that all of the Defendants in this action are private actors. Both parties filed responses. On September 19, 2002, the Court found that it had jurisdiction under § 1983, because the Defendant security officers are state actors acting under the color of state law. The Court reasoned that the Defendant security officers were vested with all the authority of a peace officer while they were acting within the scope of their authority. In addition, the Court retained jurisdiction over the supplemental state law claims.

Presently, Defendants, who removed this action to this Court, seek to have this action remanded to state court.

## II. LEGAL STANDARD

Summary judgment is appropriate only if the answers to interrogatories, depositions, admissions, and pleadings combined with the affidavits in support show that no genuine issue as to any material fact remains and the moving party is entitled to a judgment as a matter of law. *See* FED. R. CIV. P. 56(c). A genuine issue of material fact exists when there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (citations omitted). In application of this summary judgment standard, the Court must view all materials supplied, including all pleadings, in the light most favorable

to the non-moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50, 106 S.Ct. 2505 (citations omitted).

The moving party bears the initial responsibility of informing the Court of the basis for its motion and identifying those portions of the record that establish the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has met its burden, the nonmoving party must go beyond the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial. *See* FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548. The non-moving party must do more than show that there is some metaphysical doubt as to the material facts. It must present significant probative evidence in support of its opposition to the motion for summary judgment in order to defeat the motion for summary judgment. *See Moore v. Philip Morris Cos.*, 8 F.3d 335, 339-40 (6th Cir.1993).

## III. ANALYSIS

The Court shall now rule upon Defendants' arguments in the most logical order.

### A. 42 U.S.C. § 1983

The Court shall first rule upon Defendants' argument that the Court lacks jurisdiction over this matter. Defendants argue that the individual Defendant security officers were not state actors acting under color of state law, and therefore, cannot be found liable under 42 U.S.C. § 1983. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982). Thus, the Court would lack jurisdiction

to hear this action, and this action should be remanded to the Wayne County Circuit Court.[4]

1. State Action

In its September 19, 2002, Order, the Court found that the individual Defendant security officers were state actors acting under color of state law. The Court based its decision on the fact that under Michigan law, an employer may maintain private security guards in order to protect its property, however, it may also employ private security police. *See* MICH. COMP. LAWS § 338.1079. A private security police officer who is properly licensed by the State of Michigan has the authority to arrest a person without a warrant when that private security police officer is on his employer's property. *See* MICH. COMP. LAWS § 338.1080. This authority to make warrantless arrests is the same authority that is granted to a peace officer. *See id.* Any person seeking a license to become a private security police officer must comply with the requirements found in the statute, *see* MICH. COMP. LAWS § 338.1067, and must comply with the training requirements promulgated by the Michigan Department of Consumer and Industry Services, *see* MICH. COMP. LAWS § 338.1081. After reviewing the relevant case law, the Court found that the individual Defendant security officers were state actors for purposes of 42 U.S.C. § 1983 because they are properly licensed security officers who have police powers pursuant to MICH. COMP. LAWS § 338.1080.

Section 1983 provides:

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[4] The Court notes that Defendants removed this action to this Court. Defendants now argue that the Court was wrong to retain jurisdiction over this action, and argue that the Court should remand this matter. In so doing, however, Defendants are effectively arguing that not only was the Court wrong in retaining jurisdiction, but that Defendants themselves were wrong in removing the action in the first place. As the Court's analysis demonstrates, however, both the Court and the Defendants were right the first time.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law....

As this statute has been interpreted, Plaintiff must demonstrate that Defendants deprived her of a right secured by either the Constitution or a statute while Defendants were "acting 'under color of state law.'" *Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir.2003) (en banc) (quoting *Wolotsky v. Huhn* 960 F.2d 1331, 1335 (6th Cir.1992)). Under § 1983, a private party's actions may constitute state action; those actions, however, must be " 'fairly attributable to the state.' " *See id.* (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 947, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)). State action may be found if a private person exercised powers that are traditionally reserved to the State. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); *see also Chapman*, 319 F.3d at 833. This is known as the public function test. *See Chapman*, 319 F.3d at 833. The public function test is narrowly interpreted. *See id.* Examples of functions that are typically reserved to the State include exercising eminent domain and holding public elections. *See id.* (citations omitted).

The United States Supreme Court has never determined whether a private security guard who is cloaked with the authority of a police officer is a state actor performing a public function that is traditionally reserved to the state. *See Payton v. Rush-Presbyterian-St. Luke's Med Ctr.*, 184 F.3d 623, 628 (7th Cir.1999) (citing *see Flagg Bros., Inc., v. Brooks*, 436 U.S. 149, 163-64, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978)); *see also* 1A Martin A. Schwartz & John E. Kirklin,

Section 1983 Litigation: Claims and Defenses § 5.13 n. 233 (3d ed.1997). A number of federal courts have confronted this question, however, and have held that a private security guard is a state actor when he or she is vested with the authority of a police officer. *See Payton,* 184 F.3d at 628-29 (cataloguing and discussing relevant cases). For instance, in *Payton,* private security personnel could be licensed by the City of Chicago to serve as "special police officers;" these special police officers had all the powers of a regular Chicago police officer. *See id.* at 624-25. The Seventh Circuit found that such privately employed special police officers could be found to be state actors performing a public function that is traditionally reserved to the State. *See id.* at 630. Likewise, in *Henderson v. Fisher*, the Third Circuit held that the campus police at the University of Pittsburgh are state actors performing a public function, and partially based its decision on the fact that a Pennsylvania statute "has delegated to the campus police of the University of Pittsburgh the very powers which the municipal police force of Pittsburgh possesses." 631 F.2d 1115, 1118 (3d Cir.1980). In making its decision, the Third Circuit noted: "[T]he delegation of police powers, a government function, to campus police buttresses the conclusion that the campus police act under color of state authority." *Id.* And, at issue in *Rojas v. Alexander's Dept. Store, Inc.*, was a New York City ordinance that permitted private security guards to obtain a license that vested them with all the power of the city police; the Eastern District of New York held that: "[s]uch a special patrolman, with the power to arrest, is a government official subject to section 1983 liability." 654 F.Supp. 856, 858 (E.D.N.Y.1986) (citing *Williams v. United States,* 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774 (1951)).

After reviewing the decisions listed above, as well as a number of other federal court decisions, the Court finds these decisions to be persuasive. At common law, private citizens had certain powers that resemble police authority. For example, at common law, a private storekeeper had a right to

protect his or her property, and could thus detain an individual if the shopkeeper suspected that individual of theft. *See City of Grand Rapids v. Impens,* 414 Mich. 667, 327 N.W.2d 278, 281 (1982) (citation omitted). As another example, at common law, private persons had the right to use deadly force in self-defense. *See Payton,* 184 F.3d at 629 (citing *Wade v. Byles,* 83 F.3d 902, 905 (7th Cir.1996)). Other powers, however, such as the power to arrest others for violations of State statues or local ordinances, are powers that are vested in the State alone, and cannot be exercised by a private individual unless that individual is vested with such authority by the State. *See Payton* 184 F.3d at 630; *see also Thompson v. McCoy,* 425 F.Supp. 407, 409-10 (D.S.C.1976). Thus, a private individual who is vested with the powers of a police officer -- which are powers that are only vested in the State, and those private individuals to whom the State has given such powers – is a state actor acting under color of state law for purposes of § 1983.

Contrary to Defendants' assertions, this rationale is contradicted by neither the Sixth Circuit's recent decision in *Chapman v. Higbee Co.,* 319 F.3d 825 (6th Cir.2003) (en banc), nor the Michigan Supreme Court's decision in *City of Grand Rapids v. Impens,* 414 Mich. 667, 327 N.W.2d 278 (1982). In *Chapman,* a private security guard working at a department store suspected that the plaintiff was stealing from the security guard's store, and temporarily detained the plaintiff to do an investigation. *See Chapman,* 319 F.3d at 828. The Sixth Circuit held that the fact that a private security guard may investigate a crime does not transform the security guard's action into state action. *See id.* at 834. In supporting its rationale, the Sixth Circuit quoted the Fifth Circuit, and stated:

> A merchant's detention of persons suspected of stealing store property simply is not an action exclusively associated with the state. Experience teaches that the prime responsibility for protection of personal property remains with the individual. A

> storekeeper's central motivation in detaining a person whom he believes to be in the act of stealing his property is self-protection, not altruism. Such action cannot logically be attributed to the state.

*Id.* (quoting *White v. Scrivner Corp.*, 594 F.2d 140, 142 (5th Cir.1979)). Therefore, there is nothing inconsistent with what the Sixth Circuit stated in *Chapman*, and this Court's holding that the individual Defendant security officers are state actors: a security guard that is merely exercising common law rights, such as detaining individuals who are suspected of theft, is not a state actor; a security guard that exercises authority that is traditionally reserved to the State, however, such as the power to arrest, is a state actor acting under the color of state law.

The Michigan Supreme Court's holding in *Impens* is also consistent with the Court's ruling that the individual Defendant security officers are state actors. In *Impens*, private security guards employed at a retail store detained an individual who was suspected of shoplifting. *See Impens*, 327 N.W.2d at 279. The security guards were able to elicit a written confession from the individual, and then turned that confession over to the Grand Rapids police. *See id.* The individual argued that the signed confession should have been suppressed because he was not read his *Miranda* warnings. *See id.* at 279- 80. The Michigan Supreme Court found that the confession was admissible, and held that the security guards were not law enforcement officials. *See id.* at 282. During its discussion, the Michigan Supreme Court noted that the security guards who took the confession were simply exercising the common law right to detain an individual suspected of theft. *See id.* at 281-82 (citations omitted). Therefore, upon reviewing this case law, the Court determines that there is nothing inconsistent with the cases that Defendants cite and the Court's original holding that the individual Defendant security officers were state actors acting under color of state law.

In their final attempt to argue that the Court lacks subject matter jurisdiction, Defendants argue that the individual Defendant security officers in this action were doing nothing more than exercising their right to temporarily detain Plaintiff, and were not exercising their police – like authority, thus they were not acting as state actors. Indeed, Defendants maintain that Plaintiff was never actually arrested – she was never handcuffed nor patted down. Viewing the facts in the light most favorable to Plaintiff, however, the Court notes that a jury could find that the individual Defendant security officers in fact arrested her. Defendants did more than merely temporarily detain Plaintiff for the sake of investigating a crime: when Defendant Marlene Brown first approached Plaintiff, Defendant Brown lifted up her jacket and showed Plaintiff her security badge, as well as her handcuffs; meanwhile, Plaintiff was surrounded by a number of security officers while she was sitting at a slot machine, one of whom was wearing a security uniform; afterward, Plaintiff was surrounded by the security officers as they led her to the security office; after they got her into the security office, Plaintiff was made to sit at a table, and there were two security officers standing behind her, one security officers guarding the door, and another one, presumably Defendant Marlene Brown, "hover[ing]" over her – again, at least one security officer was uniformed; the Defendant security officers took a photograph of her, and photocopied her driver's license and Social Security card; although Plaintiff initially refused to hand over her Social Security card, she did so after one of the Defendant security officers, presumably Defendant Marlene Brown, stated that she was a "policewoman;" Plaintiff was not permitted to see her friends for lunch; in total, she was detained for roughly forty-five minutes to an hour; after her detention, she was escorted out of the casino by three Defendant security officers; and a Defendant security officer followed Plaintiff into the bathroom, and even stood in the same stall as Plaintiff. Clearly, a jury could find that Defendants did not simply

temporarily detain Plaintiff in order to investigate her potential theft of five cents.

2. Constitutional Violation

Defendants argue that even if the Court finds state action that they did not violate any of Plaintiff's constitutionally protected rights. In her Second Amended Complaint, Plaintiff alleges a violation of her Fourth and Fourteenth Amendment rights to be free from unreasonable seizures.[5] Defendants argue that even if Plaintiff was arrested that her arrest was supported by probable cause. Basically, Defendants state that Defendant Marlene Brown witnessed Plaintiff commit a crime by taking a token out of the tray of an abandoned slot machine, which is a crime, therefore, she had probable cause to arrest Plaintiff. *See Atwater v. City of Lago Vista,* 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001).

Defendants' argument fails for two reasons. First, Defendant Marlene Brown admitted during her deposition that the only reason Plaintiff was taken to the security office and was banned from the casino was because of her "attitude," and not because she actually stole anything from the casino. *See* Dep. of M. Brown, 65-66, 75. And second, Plaintiff correctly points out that a jury could find that she never actually stole anything from the casino.

Central to much of Defendants' argument that Plaintiff committed a crime is a Michigan statute that declares that a person commits a felony if that person:

> claims, collects, takes, or attempts to claim, collect or take money or anything of value in or from the gaming games, with intent to defraud, without having made a wager contingent on winning a

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[5] In her brief responding to Defendant's Motion for Summary Judgment, Plaintiff also states that her due process rights under the Fifth Amendment was violated. Plaintiff, however, does not raise this claim in her complaint; therefore, the Court shall not address a claim for a violation of due process.

> gambling game, or claims, collects, or takes an amount of money or thing of value of greater value than the amount won.

MICH. COMP. LAWS § 432.218(2)(j). The plain language of the statute demonstrates that an element of the offense is "intent to defraud." This necessarily implies that the victim – either the casino or another patron of the casino – must have had legal title to the property that is claimed or taken; obviously, a person can neither defraud himself, nor can he defraud anybody if he takes a piece of property that was abandoned. *See Courtney v. Feldstein*, 147 Mich.App. 70, 382 N.W.2d 734, 736 (1985) (stating that, under Michigan law, fraud requires damage to the victim). Thus, in the present action, in order to find that Plaintiff committed a crime, the Court must determine whether the casino had legal title to the five cents.

Defendants maintain that the five cent token that is at the center of this action belonged to the casino. Defendants base their assertion on the fact that the casino has a rule – which is not made known to the casino's patrons until after a patron violated the rule – that states, in essence, that if a token is found on the floor then anyone can pick it up and treat it as if it were his or her own; he or she may keep it or play it. If, however, a patron finds a token lying in the tray of an abandoned slot machine then the token is considered by the casino to be casino property, and nobody but the person who won that token can take it. Defendants' argument, however, is contrary to law.

When a person places money into a gambling game, that person is effectively entering into an aleatory contract with the casino; an aleatory contract is one in which a party's duty to perform is conditioned upon some fortuitous event, such as winning at a slot machine. *See* RESTATEMENT (SECOND) OF C ONTRACTS § 232 cmt. c (1981). Upon the happening of the fortuitous event, the casino is under an obligation to surrender money or some other valuable item to the other

party in the aleatory contract; in other words, the casino loses its legal right to the property, and the other party gains that right. Consequently, when a person is successful at a gambling game, such as a slot machine, and the slot machine pays that person, the casino loses its rights to the property paid, and the person who won the property becomes entitled to exclusive use and possession of the property.

Because, for the purposes of this motion, the Court views the facts in the light most favorable to the Plaintiff, it will assume that the token that Plaintiff found lying in the tray of the abandoned slot machine was won by another patron, however, that other patron walked away without collecting the token at issue; in short, the Court will assume that it was abandoned – the Court also notes that there is no other likely explanation for the token being in the tray of the slot machine. Thus, for purposes of this motion, the Court finds that the property was abandoned. Under Michigan law, the finder of abandoned property has a superior claim to said property than does the owner of the *locus in quo*. *See People v. Twenty-Seven Thousand Four Hundred Ninety Dollars*, 1996 WL 33348190, *1 (Mich.Ct.App. Nov.26, 1996) (citing and discussing MICH. COMP. LAWS § 434.21 *et. seq.*). Therefore, the Court concludes that Plaintiff had superior title to the five cents than did the casino. Accordingly, Plaintiff did not defraud, nor could she have had the intent to defraud, the casino because under Michigan law, Plaintiff – not the casino – had title to the abandoned piece of property.

As a consequence, the Court finds that a jury could find a constitutional violation pursuant to 42 U.S.C. § 1983. In particular, the individual Defendant security officers did not have probable cause to arrest Plaintiff because Plaintiff committed no crime; she simply claimed a piece of abandoned property.[6] This is not a case where a police officer

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[6] Indeed, if the jury finds the five cent token to have been abandoned, then it can be stated that the casino stole the five cents from Plaintiff, because she had title to it after she found it.

reasonably relied on a presumptively constitutional statute or ordinance that was subsequently declared unconstitutional. *See, e.g., Michigan v. DeFillippo,* 443 U.S. 31, 37-38, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979). If it were, then the police officer would be entitled to a valid, good-faith defense. *See id.* Here, however, the individual Defendant security officers based their actions on an unpublished casino rule that is inconsistent with Michigan law. It is a general axiom that ignorance of the law is no excuse. *See City of Kentwood v. Estate of Sommerdyke,* 458 Mich. 642, 581 N.W.2d 670, 683 (1998) (Taylor, J., concurring in part and dissenting in part). Consequently, the individual Defendant security officers cannot claim that they reasonably relied on the unpublished casino rule[7] in good faith. Accordingly, a jury can find that

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[7] This rule can be described as a "secret" rule, which is kept secret until the time someone violates the rule. For instance, during her deposition, Defendant Joetta Stevenson stated the following:

Q: Now, is there a written casino policy that prohibits [taking tokens from the tray of an abandoned slot machine]?

A: No.

Q: Is there a sign anywhere in the casino that notifies patrons that they are not allowed to pick up coins they find in trays?

A: No.

Q: How is that policy at the casino communicated to patrons?

A: We tell them.

Q: And when do you tell them, as they enter the casino?

A: No.

Q: Do you tell them before they pick a coin out of the tray?

A: No.

Q: Do you tell them after they've been found picking a coin out of a tray?

A: Yes. Dep. of J. Stevenson, 46-47.

the individual Defendant security officers did not make a reasonable seizure, and thereby violated the Fourth Amendment.

3. Conclusion

The Court finds that the individual Defendant security officers were state actors acting under color of state law, and that a jury could find that they violated Plaintiff's right to be free from unreasonable seizures under the Fourth and Fourteenth Amendments to the United States Constitution. Therefore, the Court shall deny summary judgment on this issue.

B. False Arrest/False Imprisonment

In her complaint, Plaintiff alleged that she was subject to a false arrest/false imprisonment by the individual Defendant security officers. Under Michigan law, the elements of false arrest are: 1) an arrest; 2) of a person; 3) who is innocent of the charge on which he is arrested; 4) by the defendant or at his instigation; 5) without legal justification. *See Lewis v. Farmer Jack Div., Inc.*, 415 Mich. 212, 327 N.W.2d 893, 901 (Williams, J. dissenting). In turn, the elements of false imprisonment are: 1) actually confining another; 2) intentionally performing the act of confining another; 3) the act of confining another was performed without legal justification; and 4) the victim was aware of the confinement. *See Moore v. City of Detroit*, 252 Mich.App. 384, 652 N.W.2d 688, 691 (2002). Michigan courts have held that false arrest is one type of false imprisonment; when a person is falsely arrested, he or she is always falsely imprisoned. *See Moore*, 652 N.W.2d at 690 (citing *Lewis*, 327 N.W.2d at 900-01 n. 4 (Williams, J. dissenting)).

A jury could find that Plaintiff was falsely arrested and falsely imprisoned. As for the claim of false arrest, there is no question that Plaintiff is a person, and that she was detained by the individual Defendant security officers. And, for the reasons stated in *Sections IV. A. 1. & 2.* of this Opinion and Order, a jury could find that Plaintiff was

arrested. Therefore, the first, second, and fourth elements of this tort are satisfied. In addition, for the reasons set for in *Section IV. A. 2.* of this Opinion and Order, a jury could find that Plaintiff is not guilty of the crime of stealing money from the casino. Finally, for the reasons stated in *Section IV. A. 2.* of this Opinion and Order, the Court finds, as a matter of law, that the individual Defendant security officers cannot rely on the existence of the casino rule to provide legal justification their arrest of Plaintiff. Therefore, a question of fact exists on whether there was a legal justification for Defendants' arrest of Plaintiff. In short, there are facts sufficient to allow a jury to find for Plaintiff on all five elements of the claim.

By virtue of the fact that Plaintiff can succeed on a claim for false arrest, she may also succeed on a claim for false imprisonment. A jury can find for Plaintiff on her claim of false imprisonment. For the reasons stated in *Section IV. A. 1.* of this Opinion and Order, the Court finds that there are sufficient facts to allow a jury to find that Plaintiff was confined. The Court also finds that there is no dispute that Defendants intentionally confined Plaintiff and, if the jury finds that she was in fact confined, that she was aware of her confinement. The final element is whether there is any legal justification for Plaintiff's confinement; for the reasons stated in the previous paragraph, the Court finds that a jury can find for Plaintiff on this element, too.

Consequently, the Court finds that Plaintiff's claim for false arrest/false imprisonment survives Defendants' motion for summary judgment.

C. Defamation

Plaintiff alleges a claim for defamation. She basically alleges that Defendants defamed her when they accused her of stealing casino property. Under Michigan law, there are four elements in a defamation claim: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; (4) and

either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). *See Kefgen v. Davidson,* 241 Mich.App. 611, 617 N.W.2d 351, 356 (2000).

Defendants raise two arguments as to why this claim should be dismissed: one procedural and one substantive. As for the procedural argument, Defendants argue that all of the elements of a claim for defamation must be specifically pleaded, including the defamatory words. *See Gonyea v. Motor Parts Fed. Credit Union,* 192 Mich.App. 74, 480 N.W.2d 297, 299 (1991). Defendants – relying on cases discussing libel, which is printed defamation, as opposed to slander, which is spoken defamation, and which is the type of defamation at issue here – argue that Plaintiff failed to specifically set forth the facts that her claims rely on, including the "defamatory words" and how these words were "published."

The Court disagrees. This action was originally filed in the Wayne County Circuit Court, and it complies with Michigan Court Rules. In particular, Plaintiff's complaint puts Defendants on notice of the facts that she alleges against them. *See* MICH. CT. R. 2.111(B)(1); *see also Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc.,* 197 Mich.App. 48, 495 N.W.2d 392, 395 (1992) (stating that the rationale behind requiring specific pleadings in defamation actions is to put the defendant on notice). While the Court recognizes that Michigan courts, in libel cases, requires that the complaint list " 'the very words of libel,' " *see id.* (citations omitted), this is not a libel case. *See Sullivan v. River Valley Sch. Bd.,* 1997 WL 33344778, *3 (Mich.Ct.App.1997) ("Because libel is written, it must be pleaded verbatim; however, a more generous rule applies to slander because it cannot be retained verbatim.") (citations omitted). Plaintiff's complaint puts Defendants on notice of the claims against them; she alleges that Defendants "made false, malicious and defamatory accusations about Plaintiff, accusing her of committing a

crime, to wit stealing Defendant's property." There is no question that Plaintiff's complaint sets forth sufficient allegations to inform Defendants of her claim against them. Thus, Defendants' procedural argument fails.

Defendants' substantive argument fails as well. Defendants argue that they did not make a false statement when they accused Plaintiff of stealing a token; they argue that it is in fact true that Plaintiff stole a token; Defendants also argue that they never published their false statement to a third party. As for the former argument, the Court has already ruled that if the jury finds that the token at issue was abandoned, then Plaintiff had stolen nothing. As for the latter argument, there is deposition testimony that establishes that representatives of the casino, including the named Defendants, had informed Plaintiff's two friends, Ms. Holman and Ms. Dombrowski, that Plaintiff had "stolen" casino property. Defendants argue, without citation to authority, that Plaintiff was the first person to tell her friends that she was arrested for stealing, thus, Defendants cannot be held liable for subsequently telling Ms. Holman and Ms. Dombrowski about the theft. This argument also fails; the gravamen of the harm of slander is that a person's reputation in the eyes of others is reduced. *See Bonkowski v. Arlan's Dept. Store*, 383 Mich. 90, 174 N.W.2d 765, 767 (1970). Even if the third person knows the allegations to be untrue, an action for slander may be maintained. *See id.* In the present action, when Plaintiff first informed her friends that she was accused of stealing from the casino, her friends thought it was a joke. Employees of the casino, however, told Plaintiff's friends that she had stolen from the casino. A jury could find that this affected Plaintiff's reputation amongst her friends, if only for a short period of time.

Thus, there are sufficient facts on each element of a claim for defamation to allow this claim to proceed to a jury. As a result, Defendant's Motion for Summary Judgment on this claim fails.

D. Intentional Infliction of Emotional Distress

Plaintiff's final substantive claim is for intentional infliction of emotional distress. In order to prove a claim for intentional infliction of emotional distress in Michigan, Plaintiff must prove four elements: (1) extreme or outrageous conduct; (2) that intentionally or recklessly; (3) causes; (4) extreme emotional distress. *See Grochowalski v. Detroit Auto. Inter-Ins. Exch.*, 171 Mich.App. 771, 430 N.W.2d 822, 824 (1988).[8] Defendants argue that there are insufficient facts to find that what the individual Defendant security officers did is extreme or outrageous, or that Plaintiff suffered extreme emotional distress. Defendants argue that Plaintiff was merely "embarrassed" by the entire incident, and that the individual Defendant security officers were "merely doing their job."

The Court disagrees. There is sufficient evidence to allow a jury to find that after Plaintiff picked up an abandoned token that Defendants – by using the authority vested in them by the State of Michigan – surrounded her, arrested her, led her to the security office, prevented her from leaving the security office, and stole the five cents that she found from her. Afterwards, they surrounded her as they threw her out of the casino, and refused to let her use the restroom by herself. Defendants also prevented her from having lunch with her friends, falsely told her friends that she had stolen from them, and would not let her enter the casino

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[8] Defendants discuss the history of the tort of intentional infliction of emotional distress in Michigan, and notes that such a tort has yet to be recognized by the Michigan Supreme Court. The Court, however, shall not disregard Michigan Court of Appeals decisions regarding Michigan law unless the Court is convinced that the Michigan Supreme Court would hold otherwise. *See Aetna Cas. & Sur. Co. v. Dow Chemical Co.*, 10 F.Supp.2d 771, 777 (E.D.Mich.1998). Although the Michigan Supreme Court has yet to encounter a set of facts that would allow it to find intentional infliction of emotional distress, Defendants have not convinced the Court that the Michigan Supreme Court would not adopt such a tort in the event that it is confronted with the appropriate set of facts.

to get out of the heat. Viewing these facts in the light most favorable to Plaintiff, a jury could certainly exclaim "Outrageous!" *Graham v. Ford*, 237 Mich.App. 670, 604 N.W.2d 713, 716 (1999) (quoting *Roberts v. Auto-Owners Ins. Co.*, 422 Mich. 594, 374 N.W.2d 905, 909 (1985)). Therefore, Defendants' motion for summary judgment shall not be granted as to Plaintiff's claim for intentional infliction of emotional distress.

## IV. CONCLUSION

For the reasons set forth above, Defendants' Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

No. 04-1354

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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| TELLA ROMANSKI, | ) |
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| Plaintiff-Appellee, | ) |
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| ETROIT ENTERTAINMENT, L.L.C., DOING BUSINESS S MOTORCITY CASINO., A MICHIGAN LIMITED IABILITY COMPANY, AND MARLENE BROWN, | ) |
| | ) |
| Defendants-Appellants, | ) |
| | ) |
| LORIA BROWN, ET AL., | ) |
| | ) |
| Defendants. | ) |
| | ) |

BEFORE: KEITH, CLAY and FARRIS,* Circuit Judges.

The court having received a petitioner for rehearing en banc, and the petitioner having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having

* Hon. Jerome Farris, Senior United States Judge for the Ninth Circuit Court of Appeals, sitting by designation.

favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petitioner were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Farris would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

## RELEVANT STATUTORY PROVISIONS

42 U.S.C. 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

M.C.L. 338.1079, entitled "Licensure of private security police; rules; applicability of act to private security guards and police; use of pistols," provides in relevant part:

> Sec. 29. (1) The licensure of private security police shall be administered by the department of state police. The application, qualification, and enforcement provisions under this act apply to private security police except that the administration of those provisions shall be performed by, and the payment of the appropriate fees shall be paid to, the department of state police. The director of the department may jointly promulgate rules with the department of state police under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, to facilitate the bifurcation of authority described in this subsection.

(2) This act does not require licensing of any private security guards employed for the purpose of protecting the property and employees of their employer and generally maintaining security for their employer. However, any person, firm, limited liability company, business organization, educational institution, or corporation maintaining a private security police organization may voluntarily apply for licensure under this act. When a private security police employer as described in this section provides the employee with a pistol for the purpose of protecting the property of the employer, the pistol shall be considered the property of the employer and the employer shall retain custody of the pistol , except during the actual working hours of the employee. All such private security people shall be subject to the provisions of sections 17(1) and 19(1).

M.C.L. 338.1080, entitled "Private security police officers; arrest powers; limitations," provides in relevant part:

Sec. 30. A private security police officer, as described in section 29, who is properly licensed under this act has the authority to arrest a person without a warrant as set forth for public peace officers in section 15 of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.15, when that private security police officer is on the employer's premises. Such authority is limited to his or her hours of employment as a private security police officer and does not extend beyond the boundaries of the property of the employer and while the private security police officer is in the full uniform of the employer.

M.C.L. 764.15, entitled "Arrest by officer without warrant; situations; circumstances," provides in relevant part:

Sec. 15. (1) A peace officer, without a warrant, may arrest a person in any of the following situations:

(a) A felony, misdemeanor, or ordinance violation is committed in the peace officer's presence.

(b) The person has committed a felony although not in the peace officer's presence.

(c) A felony in fact has been committed and the peace officer has reasonable cause to believe the person committed it.

(d) The peace officer has reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days or a felony has been committed and reasonable cause to believe the person committed it.

(e) The peace officer has received positive information by written, telegraphic, teletypic, telephonic, radio, electronic, or other authoritative source that another peace officer or a court holds a warrant for the person's arrest.

(f) The peace officer has received positive information broadcast from a recognized police or other governmental radio station, or teletype, that affords the peace officer reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days or a felony has been committed and reasonable cause to believe the person committed it.

(g) The peace officer has reasonable cause to believe the person is an escaped convict, has violated a condition of parole from a prison, has violated a condition of a pardon granted by the executive, or has violated 1 or more conditions of a conditional release order or probation order imposed by a court of this state, another state, Indian tribe, or United States territory.

(h) The peace officer has reasonable cause to believe the person was, at the time of an accident in this state, the operator of a vehicle involved in the accident and was operating the vehicle in violation of section 625(1), (3), (6), or (7) or section 625m of the Michigan vehicle code, 1949 PA 300, MCL 257.625 and 257.625m, or a local

ordinance substantially corresponding to section 625(1), (3), (6), or (7) or section 625m of that act.

(i) The person is found in the driver's seat of a vehicle parked or stopped on a highway or street within this state if any part of the vehicle intrudes into the roadway and the peace officer has reasonable cause to believe the person was operating the vehicle in violation of section 625(1), (3), (6), or (7) or section 625m of the Michigan vehicle code, 1949 PA 300, MCL 257.625 and 257.625m, or a local ordinance substantially corresponding to section 625(1), (3), (6), or (7) or section 625m of that act.

(j) The peace officer has reasonable cause to believe the person was, at the time of an accident, the operator of a snowmobile involved in the accident and was operating the snowmobile in violation of section 82127(1) or (3) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.82127, or a local ordinance substantially corresponding to section 82127(1) or (3) of that act.

(k) The peace officer has reasonable cause to believe the person was, at the time of an accident, the operator of an ORV involved in the accident and was operating the ORV in violation of section 81134(1) or (2) or 81135 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.81134 and 324.81135, or a local ordinance substantially corresponding to section 81134(1) or (2) or 81135 of that act.

(l) The peace officer has reasonable cause to believe the person was, at the time of an accident, the operator of a vessel involved in the accident and was operating the vessel in violation of section 80176(1) or (3) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.80176, or a local ordinance substantially corresponding to section 80176(1) or (3) of that act.

(m) The peace officer has reasonable cause to believe a violation of section 356c or 356d of the Michigan penal code, 1931 PA 328, MCL 750.356c and 750.356d, has taken place or is taking place and reasonable cause to believe the person committed or is committing the violation, regardless of whether the violation was committed in the peace officer's presence.

(n) The peace officer has reasonable cause to believe a misdemeanor has taken place or is taking place on school property and reasonable cause to believe the person committed or is committing the violation, regardless of whether the violation was committed in the peace officer's presence. As used in this subdivision, "school property" means that term as defined in section 7410 of the public health code, 1978 PA 368, MCL 333.7410.

(2) An officer in the United States customs service or the immigration and naturalization service, without a warrant, may arrest a person if all of the following circumstances exist:

(a) The officer is on duty.

(b) One or more of the following situations exist:

(i) The person commits an assault or an assault and battery punishable under section 81 or 81a of the Michigan penal code, 1931 PA 328, MCL 750.81 and 750.81a, on the officer.

(ii) The person commits an assault or an assault and battery punishable under section 81 or 81a of the Michigan penal code, 1931 PA 328, MCL 750.81 and 750.81a, on any other person in the officer's presence or commits any felony.

(iii) The officer has reasonable cause to believe a felony has been committed and reasonable cause to believe the person committed it, and the reasonable cause is not founded on a customs search.

(iv) The officer has received positive information by written, telegraphic, teletypic, telephonic, radio,

electronic, or other authoritative source that a peace officer or a court holds a warrant for the person's arrest.

(c) The officer has received training in the laws of this state equivalent to the training provided for an officer of a local police agency under the commission on law enforcement standards act, 1965 PA 203, MCL 28.601 to 28.616.

Supreme Court, U.S.
FILED
AUG 25 2006
CLERK

No. 06-38

IN THE

# Supreme Court of the United States

DETROIT ENTERTAINMENT, L.L.C.
d/b/a MOTORCITY CASINO
and MARLENE BROWN,

*Petitioners,*

*v.*

STELLA ROMANSKI,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## BRIEF IN OPPOSITION

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Table of Cited Authorities | iii |
| Introduction | 1 |
| Statement Of The Case | 2 |
| Reasons For Denying The Petition | 9 |
| I. *Certiorari* Is Not Warranted Since The Sixth Circuit Opinion Follows Supreme Court Precedent | 9 |
| A. Petitioners Waived This Argument When Both Failed To Raise It In The District Court And The Sixth Circuit. | 9 |
| B. The Sixth Circuit's Opinion Follows The First Part Of The "Fair Attribution" Test | 12 |
| 1. Petitioners Were Not Private Actors | 12 |
| 2. Petitioners Work Together With And Obtain Significant Aid From State Officials And Are Therefore State Actors Under The "Joint Participation" Test. | 16 |
| II. *Certiorari* Is Not Warranted Because There Is No Split Among The Circuits. | 18 |
| A. The Cases Cited By Petitioners Have No Application To This Case. | 18 |

*Contents*

*Page*

B. The Sixth Circuit's Decision Is Correct Because The Plenary Power To Arrest Is An Exclusive Power Reserved To The State ..... 24

III. The Punitive Damage Award Is Not Excessive In Light Of The Petitioners' "Particularly Egregious" Conduct ..... 25

Conclusion ..... 29

## TABLE OF CITED AUTHORITIES

*Page*

**CASES**

*Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) .... 16

*Argentine v. United Steel Workers of Am., AFL-CIO, CLC*, 287 F.3d 476 (6th Cir. 2002) ..... 25

*Barton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) ..... 16

*BMW of North America v. Gore*, 517 U.S. 559 (1996) ..... 25

*Boykins v. VanBuren Township*, 2006 W.L. 305751 (E.D. Mich. Feb. 9, 2006) ..... 24

*Chapman v. The Higbee Co.*, 319 F.3d 825 (6th Cir. 2003) ..... 10

*City of Grand Rapids v. Impens*, 327 N.W.2d 278 (1982) ..... 22, 23

*Duriso v. K-Mart No. 4195, Division of S.S. Kresge Co.*, 559 F.2d 1274 (5th Cir. 1977) ..... 18

*Evans v. Newith*, 382 U.S. 296 (1966) ..... 13

*Foley v. Connelie*, 435 U.S. 291 (1978) ..... 24

*Henderson v. Fisher*, 631 F.2d 1115 (3rd Cir. 1980) ... 13, 24

*Higbee Co. v. Chapman*, 542 U.S. 945 (2004) ..... 10

*Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982) ..... 12, 13, 15, 16

*Cited Authorities*

*Page*

*Murray v. Walmart*, 874 F.2d 555 (8th Cir. 1989) .... 18

*Padlo v. VG's Food Center*, 2005 W.L. 3556245 (E.D. Mich., Dec. 29, 2005) ..... 24

*Payton v. Rush-Presbyterian-St. Luke's Medical Center*, 184 F.3d 625 (7th Cir. 1999) .....13, 20, 21, 24, 25

*Rodriguez v. Smithfield Packing Co., Inc.*, 338 F.3d 348 (4th Cir. 2003) ..... 25

*Romanski v. Detroit Entertainment, LLC*, 265 F.Supp.2d 835 (E.D. Mich. 2003) ..... 4, 8

*Romanski v. Detroit Entertainment, L.L.C.*, 428 F.3d 629 (6th Cir. 2005) .....6, 12, 18, 27

*Rojas v. Alexander's Dept. Store, Inc.*, 654 F. Supp. 856 (E.D.N.Y. 1986) ..... 13, 24

*Screws v. United States*, 325 U.S. 91 (1945) ..... 25

*Sherman v. Kasotakis*, 314 F. Supp.2d 843 (N.D. Iowa 2004) ..... 28

*Smith v. Brookshire Bros. Inc.*, 519 F.2d 93 (5th Cir. 1975), *cert. denied;* 424 U.S. 915 (1976) ..... 18

*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) ..... 25

*Swinton v. Potomac Corp.*, 270 F.3d 794, 820 (9th Cir. 2001) ..... 26

*Cited Authorities*

*Page*

*Taylor v. Freeland & Kronz, et al.*, 503 U.S. 638 (1992) ..... 10

*Thompson v. McCoy*, 425 F. Supp 407 (D.S.C. 1976) ..... 13, 24

*United States v. Hoffman*, 498 F.2d 879 (7th Cir. 1973) ..... 24-25

*United States v. Price*, 383 U.S. 787 (1966) ..... 16

*Wade v. Byles*, 83 F.3d 902 (7th Cir. 1996) ..... 21, 22

*Williams v. Kaufman County*, 352 F.3d 994 (5th Cir. 2003) ..... 26

*Williams v. United States*, 341 U.S. 97 (1951) ..... 13

*Youakim v. Miller*, 425 U.S. 231 (1976) ..... 10

**STATUTES**

M.C.L. § 338.1052(1)(a) ..... 19

M.C.L. § 338.1057 ..... 19

M.C.L. § 338.1059(1) ..... 19

M.C.L. § 338.1060 ..... 19

M.C.L. § 338.1079(1) ..... 1, 18, 22

M.C.L. § 338.1079(2) ..... 1, 18, 22, 23

M.C.L. § 338.1080 ..... 6, 11, 12, 21, 22

*Cited Authorities*


| | *Page* |
|---|---|
| M.C.L. § 338.1081 | 19 |
| M.C.L. § 600.2917 | 23, 24 |
| M.C.L. § 764.15 | 14 |
| 42 U.S.C. § 1983 | 1, 8, 13, 15 |

## INTRODUCTION

Petitioners Detroit Entertainment, L.L.C. d/b/a MotorCity Casino (hereafter "Casino") and Marlene Brown have shown no compelling reasons for their Petition for a Writ of *Certiorari* to be granted ("Petition"). This case involves the limited issue as to whether private "security police officers" certified by statute in Michigan with full police powers to make an arrest are state actors for 42 U.S.C. § 1983 purposes.

This case, contrary to the representations in the Petition, is limited to private "security police officers" who are trained, supervised, regulated, disciplined and subject to the control of the Michigan State Police under M.C.L. § 338.1079(1) unlike private "security guards," who are not subject to the authority of the Michigan State Police but are merely "employed for the purpose of protecting the property and employees of their employer." M.C.L. § 338.1079(2)[1].

Petitioners' initial argument that the Sixth Circuit does not follow Supreme Court precedent is illusory, given that, in 32 of the 36 cases cited by Petitioners, or over 88% of the time, § 1983 cases are summarily dismissed by the courts in the Sixth Circuit for lack of state action. Petitioners have also failed to establish any circuit conflict. The Third, Sixth and Seventh Circuits agree that a private party, with plenary police power to arrest, who is also trained, licensed, supervised and controlled by a public police agency is a "state actor" for 42 U.S.C. § 1983 purposes. The cases cited by Petitioners in a half-hearted attempt to create a conflict involve private citizens exercising common law rights and not individuals regulated by the state police and delegated with state statutory authority to arrest.

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1. Petitioners now recognize the distinction between a "security police officer" authorized to make an arrest and a "security guard." In their papers in the district court, they properly refer to Petitioner Brown and her colleagues as "security police officers." After the Sixth Circuit issued its opinion, they began referring to them as "security guards" starting with the petition for rehearing *en banc* even though Petitioner Brown testified at trial she was a security police officer and her supervisor testified the Casino does not employ "security guards."

Finally, this court should not hold this case pending its decision in *Phillip Morris, U.S.A. v. Williams*, No. 05-1256. The punitive damage issue raised by Petitioners in the Sixth Circuit was whether the jury properly deviated from the 10-1 ratio of punitive damages to actual damages. In *Phillip Morris*, the questions presented do not involve the ratio, but rather whether the jury may consider a defendant's harm to other individuals and whether that conduct was analogous to a crime. Although the jury exceeded the court's ratio, as the district court remarked, the facts in this uniquely reprehensible and egregious case fall "squarely within [the Supreme Court's] exception to the ratio." The Petition should be denied.

## STATEMENT OF THE CASE

On August 7, 2001, Respondent Stella Romanski, then 72 years old, visited the MotorCity Casino as part of a "senior package" that for $9.00 provided a bus ride from the northern suburbs of Detroit, Michigan, on a MotorCity Casino "senior" bus to the Casino in Detroit and back, as well as an "all you can eat" lunch at the Casino's buffet.

While playing the nickel slot machines, she innocently picked up a nickel token[2] left behind by a prior successful bettor in the tray of a slot machine. She was immediately surrounded by Petitioner Marlene Brown, as well as three other security police officers, at least one in uniform.[3] A uniformed security police officer "ordered" her to come with him. Although the Petitioners refer to the officers in the Petition as security guards, the Casino does not employ security guards, but rather security police officers. Both Ms. Brown and her supervisor, Joetta Stevenson, repeatedly corrected Ms. Romanski's counsel during depositions when he referred to them as security guards. At trial, Ms. Stevenson stressed "our officers are officers, we don't have any security guards."

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2. The Casino does not use nickels, but rather tokens, in various denominations. The token at issue had a value of 5 cents and has been variously described as a token, nickel or coin.

3. Ms. Romanski testified one was in uniform and Ms. Brown testified two security police officers in uniform took Ms. Romanski to the security office.

Ms. Brown testified she told Ms. Romanski she was a "security police officer."

Petitioner Brown has given conflicting accounts of what happened in her written report, her deposition testimony, and her testimony at trial[4]. Although Ms. Brown now claims Ms. Romanski was "belligerent," her written report, which is required to be filled out immediately after an arrest pursuant to Michigan Gaming Control Board (hereinafter "MGCB") regulations, states that Ms. Romanski "was escorted to security office without incident or injury."[5] Ms. Romanski was taken to the security office by Ms. Brown and two uniformed security police officers and held for over an hour in a small room without windows. Ms. Stevenson, the Casino's security shift manager, testified that a uniformed officer stood outside the door so that Ms. Romanski could not "escape." Ms. Brown testified that upon arriving at the security office with Ms. Romanski, she immediately notified Sergeant Haneley of the Michigan State Police pursuant to the requirement that she has to "report everything we do" to the Michigan State Police.

Ms. Romanski testified that someone from the Casino asked her for her driver's license and her Social Security card. Ms. Romanski did not want to give her Social Security card, but did so because Ms. Brown told her "she was a policewoman" and she saw Ms. Brown's badge and handcuffs. At trial, Ms. Brown admitted that Ms. Romanski did not want to give her the Social Security card.

Ms. Brown confiscated Ms. Romanski's ticket from the Casino that entitled her to eat lunch at the "all you can eat" buffet as well as the nickel token. Ms. Romanski was told to "stand up" and someone took her "mug shot." She was told she could not eat lunch and she could not return to the Casino for six months because she had committed a crime by picking up the nickel based on an unwritten and unpublished rule

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4. At one point during her testimony at trial in the district court, Judge Zatkoff commented "I am confused."

5. Joetta Stevenson, the Casino's security manager, when asked if Ms. Romanski was belligerent, stated "not to my knowledge."

which was contrary to Michigan law regarding abandoned property, that tokens found on the floor of the Casino belong to the finder but tokens left behind in a slot machine tray remain the property of the Casino[6]. MGCB regulations, promulgated with input from the Casino, do not address the situation as admitted by Deborah Robinson, a manager at the Casino.

Before leaving the Casino, Ms. Romanski asked to use the restroom. Ms. Brown accompanied her into the restroom and stood immediately outside the restroom stall while Ms. Romanski, who was suffering from diarrhea, relieved herself. Three other security police officers waited outside the restroom door.

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6. Judge Zatkoff, in his opinion, commented: "This rule can be described as a 'secret' rule, which is kept secret until the time someone violates the rule. For instance, during her deposition, Defendant Joetta Stevenson stated the following:

Q: Now, is there a written casino policy that prohibits [taking tokens from the tray of an abandoned slot machine]?

A: No.

Q: Is there a sign anywhere in the casino that notifies patrons that they are not allowed to pick up coins they find in trays?

A: No.

Q: How is that policy at the casino communicated to patrons?

A: We tell them.

Q: And when do you tell them, as they enter the casino?

A: No.

Q: Do you tell them before they pick a coin out of the tray?

A: No.

Q: Do you tell them after they've been found picking a coin out of a tray?

A: Yes."

Dep. of J. Stevenson, 46-47, *Romanski v. Detroit Entertainment, LLC*, 265 F. Supp. 2d 835, 846, footnote 7 (E.D. Mich. 2003).

While the four security police officers were escorting Ms. Romanski out of the Casino, she told them she could not go anywhere because she came on the Casino's "senior bus." She was then escorted to an air conditioned room, but was not allowed to eat lunch[7]. She was told by the Casino security police officers that her bus would arrive at 3:00 p.m. and where to pick it up. She was also told by the Casino's security police officers when her bus arrived she was "to get on it." Around 3:00 p.m. Ms. Romanski did as she was told and negotiated walking across a major six lane highway during the start of rush hour traffic. When she got to the bus the Casino told her would take her home, she noticed a sign indicating a destination over 100 miles from her home and she did not get on the bus.

By this time, weather reports introduced into evidence indicated the temperature was 95°. Ms. Romanski testified she was "wringing wet." Ms. Romanski, who had not eaten since 9:00 a.m., again crossed the street, went back to the Casino, sat on the sidewalk outside the Casino and "just cried." Ms. Romanski's two elderly companions, who had been looking for her for since 1:30 p.m., found her on the street "shaking" and about to "pass out."

Her companions physically escorted her into the air conditioned vestibule of the Casino (but not the Casino itself) when all three were surrounded by Ms. Brown and two other security police officers. When one of Ms. Romanski's companions remarked that this whole situation was "stupid," Ms. Brown, age 39 at the time, (who stands 5'9" and weighs 204 pounds) went "ballistic" and physically threatened the 5'1", 145 pound Ms. Romanski and her elderly companions until her supervisor, Ms. Stevenson, commanded her to "stand

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7. When questioned about what Ms. Romanski could have eaten until the Casino's bus returned her home sometime after 7:00 p.m., Ms. Brown testified she could have walked in the 95° heat to a nearby gas station to buy some "chips." Ms. Brown also testified she "probably would have gotten fired" if she brought Ms. Romanski something to eat from the Casino snack shop.

down."[8] Ms. Romanski's bus eventually arrived and she "cried all the way home."

Ms. Romanski filed an action in state court alleging various theories including false arrest, false imprisonment, defamation and intentional infliction of emotional distress. She was permitted to file an amended complaint alleging § 1983 violations when, Ms. Brown testified during discovery she was not merely a "security guard," but was a licensed security police officer under M.C.L. § 338.1080 (commonly known as PA 330) and had the same authority as a police officer under Michigan law to make an arrest while on Casino property and in uniform.[9] Ms. Brown also testified she reported to the Michigan State Police.

Ms. Brown testified that she had previously arrested patrons, carries handcuffs and a badge, and before she approaches someone will "flip her jacket" to reveal both the handcuffs and badge. As a result of her PA 330 certification, Ms. Brown is permitted to carry a handgun while on duty, unlike a security guard.

Ms. Brown, and the other licensed security police officers underwent several weeks of rigorous training by the Michigan State Police at the Police Academy in Detroit, Michigan. She testified her training included a knowledge of the law, how to

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8. The Casino, which maintains an elaborate audio and visual surveillance system pursuant to MGCB regulations, did not preserve any tapes of the incident regarding the alleged felony theft of the nickel, Ms. Romanski's interrogation, or the incident in the vestibule of the Casino, even though it reported Ms. Romanski's arrest to the Michigan State Police and the MGCB for violations of the state gaming statutes.

9. Until now, as the Sixth Circuit remarked, although Brown was not wearing a uniform "Defendants have never contended that this rendered Brown out of uniform for purposes of M.C.L. § 338.1080." *Romanski v. Detroit Entertainment, LLC*, 428 F.3d 629, 633 (6th Cir. 2005). Indeed, up until now, Petitioners have always maintained Ms. Brown had probable cause to make an arrest due to Ms. Romanski's alleged misdemeanor/felony in attempting to defraud the Casino out of the nickel. Ms. Brown testified she did not have to be in uniform to make an arrest. In state court, and district court, the Casino took the position the arrest was privileged because Ms. Brown, although not in uniform, was PA 330 certified to make arrests.

effectuate an arrest, how to apply force to effectuate an arrest, how to apply pressure points to subdue someone resisting an arrest and how to apply handcuffs. She also attended a one week firearms training course.

Ms. Brown is subject to fingerprinting and a background check by the Michigan State Police and must meet its requirements related to age, security or law enforcement experience and an absence of felony and certain misdemeanor convictions.

Ms. Brown, unlike a security guard, also is required to be trained in criminal law and procedure, civil law and diversity, firearms proficiency and defensive tactics, CPR/first aid, non-violent intervention and emergency preparedness, and patrol operations. A licensed security police officer is regulated by the Michigan State Police, unlike a security guard who is regulated by the Michigan Department of Consumer and Industry Services. The Michigan State Police promulgate regulations under PA 330 and is responsible for training licensed security police officers. As of August, 2006, according to the Michigan State Police website, only nine business entities in Michigan use licensed private security police officers.[10]

In addition to regulating the Casino's security police officers, the Michigan State Police maintains an office and officer at the Casino. The Detroit Police Department and MGCB also have offices and an officer at the Casino, 24 hours per day, 7 days per week. As a licensed security police officer at the Casino, Ms. Brown reported to the Michigan State Police.

Prior to this incident, Ms. Brown, testified she had previously arrested patrons and turned them over to the Michigan State Police or Detroit Police Department for transportation to jail. More importantly, however, Ms. Brown and the Casino's security police officers are subject to the control of the Michigan State Police. The Casino's security manager, Ms. Stevenson, testified she and her officers, including Ms. Brown, would be required to make an arrest if

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10. At trial, Ms. Brown testified she was no longer licensed. At oral arguments in the Court of Appeals, the Casino's counsel indicated that all Casino employees are no longer licensed under PA 330.

the Michigan State Police instructed them to do so. Additionally, during the interrogation of a suspect, Ms. Brown will contact the Michigan State Police to "run a check on them."

After the amended complaint was filed in state court, the Petitioners removed the case to federal court. The district court issued an order to show cause why it had jurisdiction. Petitioners filed a response alleging that the federal court did not have jurisdiction because its security officers were not "state actors."

The district court retained jurisdiction because of the § 1983 claim stating

> under Michigan law, an employer may maintain private security guards in order to protect its property, however, it may also employ private security police. *See* M.C.L. § 338.1079. A private security police office who is licensed has the authority to arrest a person without a warrant when that private security police officer is on the employer's premises. *See* M.C.L. § 338.1080. This authority to make a warrantless arrest is the same authority that is granted a peace officer. *See id.*

(Order dated September 19, 2002, pg. 2.)

Petitioners then filed their motion for summary judgment alleging that they were not state actors and alternatively, even if they were, Ms. Romanski's alleged "conduct in taking a token which did not belong to her constituted a misdemeanor or a felony," and therefore they "had probable cause to detain her for admittedly violating the [Michigan Gaming Regulations]." (Brief in support of motion for summary judgment, pgs. 24-25.)

The district court denied the motion, ruling that Ms. Brown was not simply a security guard but rather a private security police office "vested with the powers of a police officer – which are powers that are only vested in the State, and those private individuals to whom the State has given such powers – [and was] a state actor acting under color of state law for purposes of § 1983." *Romanski v. Detroit Entertainment, LLC*, 265 F. Supp. 2d 835, 842 (E.D. Mich. 2003).

The district court further found there was a question of fact as to probable cause for Ms. Romanski's arrest because "... a jury could find that she never actually stole anything from the casino." *Id.* at 844. Since [the token] was found in the tray of the slot machine, accepting "the facts in the light most favorable to plaintiff it was won by another patron who failed to claim it, and under Michigan law it was abandoned property found by Ms. Romanski." *Id.* at 845.

At trial, the jury found the Casino had falsely arrested and imprisoned Ms. Romanski and that both the Casino and Ms. Brown violated her right to be free from an unreasonable seizure under the Fourth Amendment. The jury awarded actual damages of $279.05, punitive damages[11] of $500.00 as to Ms. Brown, and punitive damages of $875,000.00[12] as to the Casino.

The Sixth Circuit affirmed the trial court's finding that the Petitioners were "state actors" but reduced the punitive damage award as to the Casino to $600,000.00. The Sixth Circuit denied the Petitioners' motion for rehearing and rehearing *en banc*.

## REASONS FOR DENYING THE PETITION

### I. *CERTIORARI* IS NOT WARRANTED SINCE THE SIXTH CIRCUIT OPINION FOLLOWS SUPREME COURT PRECEDENT

#### A. Petitioners Waived This Argument When Both Failed To Raise It In The District Court And The Sixth Circuit.

Petitioners contend that *certiorari* should be granted because the Sixth Circuit failed to properly apply the "fair attribution" test. In their brief in support of motion for summary judgment, at page 16, Petitioners direct the district

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11. Punitive damages were awarded under Ms. Romanski's § 1983 claims. Michigan law does not permit punitive damages.

12. The evidence at trial showed the Casino averages $1 million per day in gross revenues.

court to the very test Petitioners now claim the Sixth Circuit erred in applying. Petitioners reiterated this test in their motion for judgment notwithstanding verdict.

In their "statement of questions presented," and in the body of their brief to the Sixth Circuit, the failure of the district court to apply the "fair attribution" test is not raised by Petitioners. Petitioners also failed to mention the "test" in their reply brief in the Sixth Circuit. Finally, Petitioners again did not raise the Sixth Circuit panel's failure to apply the "fair attribution" test before the full Sixth Circuit in their petition for rehearing *en banc*.

The Supreme Court has held on numerous occasions that it will not decide questions not raised or resolved in the lower courts. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Taylor v. Freeland & Kronz, et al.*, 503 U.S. 638 (1992).

Petitioners contend the excuse for their tardiness in not even mentioning this issue in the state court, in their three briefs filed in the district court, and in their three briefs filed in the Sixth Circuit, is a "wall of on-point, settled circuit precedent" against them in the Sixth Circuit. (Petition, pg. 18, footnote 5.) This assertion is somewhat surprising considering that a review of the cases cited in footnote 3, pages 14-15 of the Petition to support the "wall of on-point, settled circuit precedent" shows that in 32 of 36 cases, or 88% of the time, the courts in the Sixth Circuit summarily dismiss § 1983 claims for lack of state action[13]. It is more likely, however, Petitioners failed to raise this issue in the lower courts because they argued Ms. Romanski "stole" the nickel and therefore, Ms. Brown had probable cause to arrest her, a fundamentally inconsistent position than the one they now argue, i.e., that Ms. Brown misused a state statute because she did not have probable cause to arrest Ms. Romanski.

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13. The Supreme Court was recently invited to review this "wall" of Sixth Circuit precedent in *Chapman v. The Higbee Co.*, 319 F.3d 825 (6th Cir. 2003) and declined to do so. *Higbee Co. v. Chapman*, 542 U.S. 945 (2004).

Ms. Brown, in her initial report[14] which she was required to prepare and send to the Michigan State Police and MGCB, pursuant to state regulations, acknowledged that Ms. Romanski was arrested for taking a "$0.05 coin" out of a slot machine tray. In state court, Petitioners claimed that since Ms. Brown was licensed to make an arrest under M.C.L. § 338.1080, Ms. Romanski's false arrest/false imprisonment claims should be dismissed because she admitted she took the token, and therefore, Ms. Brown had probable cause to make the arrest.

Similarly, in their motion for summary judgment in the district court, Petitioners argued that since Ms. Romanski admitted she took the token, Ms. Romanski's false arrest/false imprisonment claims should be dismissed because the "security officers clearly had probable cause." More importantly, however, Petitioners argued that the "security officers were certified under the strictures of Public Act 330. Therefore even if Plaintiff's actions constituted a misdemeanor according to M.C.L. § 338.1080, the Defendant officers had authority to detain her." (Brief in support of defendants' motion for summary judgment, pg. 7.) In support of their claim that Ms. Romanski's § 1983 claim should be dismissed, Petitioners similarly argued "probable cause" because the taking of the token was either a misdemeanor or felony (*Id.* pg. 25).

The district court, in rejecting the Petitioners' probable cause arguments, determined that since the token was found in the tray of the slot machine, a prior patron had won the token and abandoned it. Therefore, under Michigan law, Ms. Romanski as the finder of abandoned property, could not have stolen the token from the Casino. At trial, and in the Sixth Circuit, Petitioners also argued certain jury instructions should have been given on lost or abandoned property to support

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14. At trial, Ms. Brown argued she merely detained Ms. Romanski. It is undisputed that Ms. Brown's report referred to Ms. Romanski as a "suspect." The security manual instructs the security police officers at the Casino to refer to patrons as "suspects" only if the employee arrested the patron and otherwise refer to the patrons as subjects. The manual also cautions to use the proper choice of words in order to avoid litigation. The Casino's security manager, Ms. Stevenson, approved the report.

the "probable cause" theory. It should be apparent that Petitioners failed to raise this issue in the lower courts because they argued "probable cause" and not because of the purported "wall" of Sixth Circuit precedent.

### B. The Sixth Circuit's Opinion Follows The First Part Of The "Fair Attribution" Test

Contrary to the assertions in the Petition, the Sixth Circuit properly followed the two part approach to "fair attribution" set forth in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982):

> First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible.
>
> * * *
>
> Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has significant aid from state officials, or because his conduct is otherwise chargeable to the state. *Lugar*, 457 U.S. at 937.

It is clear from the Sixth Circuit's opinion, that the court determined that Petitioners were "exercising a right or privilege created by the state," when it concluded that "Brown ha[d] the authority to arrest a person without a warrant as set forth for public police officers . . ." M.C.L. § 338.1080, *Romanski*, 428 F.3d at 638. The licensed security police officers are "person[s] for whom the state is responsible" based on their statutory authority to arrest as well as the training, certification, control, discipline and regulation by the Michigan State Police.

#### 1. Petitioners Were Not Private Actors

The district court and Sixth Circuit properly determined Ms. Brown and the Casino's security police officers were state actors when they became licensed to make an arrest pursuant

to the same statutory authority in Michigan that permits police officers to make an arrest. When private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations. *Evans v. Newith*, 382 U.S. 296, 299 (1965). When private actors obtain state certified police power and exercise this authorized police power, they lose their status as private actors and become state actors amenable to suit under 42 U.S.C. § 1983. *Williams v. United States*, 341 U.S. 97 (1951); *Thompson v. McCoy*, 425 F. Supp 407 (D.S.C. 1976); *Rojas v. Alexander's Dept. Store, Inc.*, 654 F. Supp 856 (E.D.N.Y. 1986); *Henderson v. Fisher*, 631 F.2d 1115 (3rd Cir. 1980); *Payton v. Rush-Presbyterian-St. Luke's Medical Center*, 184 F.3d 625 (7th Cir. 1999). Petitioners failed to raise this issue in the lower courts because neither was a "private actor" under *Lugar*, by virtue of the certification of the security police officers under PA 330.[15]

In support of the claims that Ms. Brown was a private actor, Petitioners rely on a number of cases cited that can be fairly categorized into two groups: (1) private citizens misusing state statutes such as garnishment, attachment, etc., to satisfy debts; and (2) private citizens effectuating common law citizens arrests, neither of which is an exclusive public function.

Not one case cited by Petitioners involved a security police officer obtaining and using state statutory powers to make an arrest. Petitioners' argument fails because, when she was at the Casino, Ms. Brown was a police officer under the control of the Michigan State Police, unlike a security guard exercising a common law shopkeepers privilege to detain, such as the store security guards in the cases cited by Petitioners. Ms. Brown had, and exercised, Michigan statutory authority to

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15. Petitioners claim the lower courts failed to properly apply the *Lugar* test. However, *Lugar* has suggested that these tests may be simply "different ways of characterizing the necessary fact-bound inquiry that confronts the Court [when resolving state actor questions]". *Lugar*, 457 U.S. at 939.

make an arrest under PA 330, which is the same authority as a police officer in Michigan under M.C.L. § 764.15.

Ms. Brown was at all times supervised by and subject to discipline review by the Michigan State Police. She had to follow orders from the Michigan State Police at the Casino. She and the other officers attended a rigorous training program under the direction of the Michigan State Police at the Police Academy. Ms. Brown testified her training included knowledge of the law, how to effectuate an arrest, how to apply force in order to effectuate an arrest, how to apply "pressure points" to subdue someone resisting an arrest and how to apply handcuffs.

Ms. Brown was subject to an application and background check, similar to that of a police officer, by the Michigan State Police. Her fingerprints were filed with the Michigan State Police. She was obligated to meet minimum requirements related to age, security or law enforcement experience, and an absence of felony and certain misdemeanor convictions.

Ms. Brown, unlike a security guard, was also required to be trained in criminal law and procedure, civil law and diversity, firearms proficiency and defensive tactics, CPR/first aid, non-violent intervention and emergency preparedness and patrol operations. A security police officer in Michigan is subject to the regulation of the Michigan State Police, unlike a security guard who is subject to regulation by the Michigan Department of Consumer and Industry Services. Moreover, the Michigan State Police promulgates the regulations under PA 330 and is responsible for training security police officers.

Ms. Brown testified she has previously exercised her PA 330 authority and arrested patrons. Ms. Brown testified at trial she is not required to be in uniform to make an arrest,[16]

16. Even if Ms. Brown is required to be in uniform, she certainly intended to make an arrest in this instance as evidenced by her written report. Moreover, she called for two uniformed security police officers to assist her and, while Ms. Romanski was in the interrogation room, a uniformed officer stood guard outside the door to prevent the 72 year old's "escape."

and she is authorized, under the PA 330 statute, to carry a handgun. She also carries a badge and handcuffs. She further testified when she approaches someone to arrest them, she will "flip her jacket" to reveal both the handcuffs and badge. She identifies herself to suspects as a "security police officer" and not as a security guard.

When she approached Ms. Romanski, she testified "I flashed my badge" and told her "I am a security police officer." Ms. Brown admitted the Casino issued her a security manual which included a chapter on avoiding liability under 42 U.S.C. § 1983. More importantly, she acknowledged the security manual listed four levels of force in making an arrest. The first level on the continuum "is to persuade by a show of authority of an officer in uniform, or by communicating with verbal and/or non-verbal dialogue. Verbal and non-verbal commands must be given to direct and let the subject know what authority you have to detain/arrest, and what the subject must do to comply." For purposes of the security manual "arrest means to take a person into custody."

Petitioners rely on a number of cases involving store security guards exercising a shopkeepers common law privilege in support of their erroneous contention that Ms. Brown was a private actor misusing a state statute. It is clear from the foregoing that Ms. Brown, while she was at the Casino, was exercising her statutory authority to arrest, and met the first part of the fair attribution test which is "the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. It is also clear Ms. Brown, while on the Casino premises had the same authority as a police officer in Michigan and therefore met the second part of the test because her conduct is chargeable to the state. She is a "police officer" at the Casino. She has the statutory power of a police officer to carry a handgun, and full authority to arrest. She is subject to certification, training, control, discipline, and regulation by the Michigan State Police, unlike a security guard or for that matter, a private citizen requesting a sheriff to execute a garnishment or effectuating a

citizen's arrest. She would be required to arrest a patron if ordered to do so by the Michigan State Police officer assigned to the Casino. She unquestionably used this statutory authority to arrest Ms. Romanski pursuant to a Casino policy that violated Michigan law. She used the authority of the state when she identified herself as a "police woman," flashed her badge and handcuffs, demanded Ms. Romanski's drivers license and Social Security card, took her "mug shot" and told her she had committed a crime. Moreover, before she and the Casino filed this Petition, both maintained in the state and federal court that the arrest was made pursuant to her PA 330 authority upon probable cause.

**2. Petitioners Work Together With And Obtain Significant Aid From State Officials And Are Therefore State Actors Under The "Joint Participation" Test.**

The Casino and Ms. Brown's "joint participation with state officials" is sufficient to characterize both as "state actors" for purposes of the Fourteenth Amendment. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Lugar, supra* 457 U.S. at 941. A private party may act under color of law if she is a "willing participate in a joint activity with the state as its agents." *United States v. Price*, 383 U.S. 787 (1966). State action can exist when the state is a joint participant in the enterprise. The inquiry is fact-specific and is determined on a case-by-case basis. *Barton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). This is more commonly known as the symbiotic relationship or nexus test. *Lugar*, 457 U.S. at 947.

The Michigan State Police, City of Detroit Police Department and MGCB all have officers and offices at the Casino. While Ms. Romanski was being processed, Ms. Brown immediately notified Sergeant Haneley, the Michigan State Police officer assigned to the Casino, and John Trafely of the MGCB, pursuant to State regulations that require the Casino to report "everything we do" anytime the Casino security offices move, detain or apprehend someone. Ms. Brown, also

contacts the Michigan State Police during interrogation of patrons to "run a check on them."

Ms. Stevenson, the Casino's security shift manager testified the Michigan State Police "work and communicate together" with the Casino's security police officers. Additionally, the Casino provides evidence and cooperates with the Michigan State Police in the decision to prosecute someone.

Ms. Stevenson testified her office and officers are required to report to the Michigan State Police and if the Michigan State Police directed her to, she would be required to direct her security police officers to detain a suspect and physically remove them to a security office. Ms. Stevenson specifically testified that if ordered to do something by the Michigan State Police, she "would not have the discretion" to tell the Michigan State Police, "No."

The MGCB regulations require the Casino to maintain a detention area. These regulations also require the Casino to maintain surveillance equipment and permit the Michigan State Police and MGCB to use it. The surveillance must visually record all observed criminal activity, arrests or evictions, detention of persons and security.

Essie Brooks, the Casino's surveillance director, testified that the Casino communicates daily with the MGCB. If Casino personnel, "rightly or wrongly" think someone has committed a crime, they are required to notify both the Michigan State Police and MGCB. The Casino is "officially" involved with the Michigan State Police from the beginning of their investigation. Mr. Brooks testified "they come to us and speak to us about what their needs are."

Deborah Robinson, a manager at the Casino and a retired Detroit Police Officer, testified the MGCB and Michigan State Police have unfettered access in the surveillance room and can "walk wherever they want to." The Michigan State Police and MGCB can monitor any location in the Casino, except the restrooms, from their private offices. The security policy at

the Casino is approved by the MGCB with the knowledge of the Michigan State Police. The Casino actively participates with the Michigan State Police in the decision to prosecute a suspect.

The Casino regularly meets with the MGCB, the Michigan State Police and the Michigan Attorney General's Office and has entered into "memoranda of understanding" concerning the jurisdiction of the Detroit Police Department and the Michigan State Police.

Petitioners "joint participation" with the Michigan State Police, MGCB and Detroit Police Department is sufficient to characterize them as a "state actors" for § 1983 purposes and they are not, as Petitioners contend, simply a private citizen misusing a garnishment statute or making a citizens arrest. *Smith v. Brookshire Bros. Inc.*, 519 F.2d 93, 94 (5th Cir. 1975), *cert. denied*; 424 U.S. 915 (1976); *Duriso v. K-Mart No. 4195, Division of S.S. Kresge Co.*, 559 F.2d 1274, 1277 (5th Cir. 1967); *Murray v. Walmart*, 874 F.2d 555 (8th Cir. 1989).

## II. *CERTIORARI* IS NOT WARRANTED BECAUSE THERE IS NO SPLIT AMONG THE CIRCUITS.

### A. The Cases Cited By Petitioners Have No Application To This Case.

Petitioners' faulty analysis is premised on the erroneous conclusion that the Casino's licensed security police officers have no more authority than store security guards who possess the common law shopkeeper's privilege to detain a suspected shoplifter but not arrest them. The Sixth Circuit correctly determined that a licensed "private security police officer [under M.C.L. § 338.1079(1)] has the same statutory authority as a police officer in Michigan to effectuate an arrest, unlike a "private security guard" who, under PA 330, does not have this statutory authority to make an arrest but is merely "employed for the purpose of protecting the property and employees of their employer." M.C.L. § 338.1079(2). *Romanski*, 428 F.3d at 638.

A licensed security police officer is subject to the administrative authority of the Michigan State Police, unlike a security guard who is subject to administrative authority of the Michigan Department of Consumer and Industry Services.[17] M.C.L. § 338.1079; M.C.L. § 338.1052(1)(a). Unlike a security guard, an applicant for licensure as a private security police officer must comply with the training requirements of the Michigan State Police. M.C.L. § 338.1081.

The Michigan State Police must conduct an investigation into an applicant's character (M.C.L. § 338.1057) and may only issue a license when it is "satisfied of the good character, competence, and integrity of the applicant." M.C.L. § 338.1059(1). The Michigan State Police may revoke the license of a security police officer for various reasons, including dishonesty and fraud. M.C.L. § 338.1060.

At the time of this incident, the Casino, according to Ms. Stevenson, did not employ security guards. Petitioners' attempt to classify the security police officers at the Casino as security guards is both legally and factually wrong. Ms. Brown testified she was a "security police officer."

Petitioners claim a conflict between the Sixth Circuit and the Fifth, Tenth and Seventh Circuits. None of these "conflict" cases remotely resemble the facts in this case, which is limited to the nine business entities in Michigan that voluntarily employ licensed security police officers.[18] The Fifth Circuit case involved a store's employees invoking a common law shopkeeper's privilege and the Tenth Circuit case involved a common law "citizens arrest" for trespassing. Neither Circuit dealt with an individual who was trained at a police academy by state police officers, whose qualifications were vetted by the state police, was licensed with the same "authority to arrest

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17. In addition to regulating security guards, the Michigan Department of Consumer and Industry Services has administrative authority over, among others, accountants, real estate agents, barbers, builders, cosmetologists, cemeteries, collection agencies, interior designers and landscape architects.

18. The statute does not mandate that a particular employer hire licensed security police with arrest authority instead of security guards.

without a warrant as set forth for public peace officers" and was required to follow orders of the state police.

In upholding the district court's determination that PA 330 licensed security police officers in Michigan were "state actors" the Sixth Circuit correctly agreed with the Seventh Circuit's reasoning in *Payton, supra.* In *Payton,* unlike any of the cases cited by Petitioners, the arrest was made by "special police officers" licensed under a City of Chicago ordinance similar to the Michigan statute in this case.

Under the ordinance, special police officers were licensed to make arrests "at the places for which they are respectively appointed or in the line of duty for which they are engaged." 184 F.3d at 625. The ordinance required that the special police be appointed and licensed by the city, that the superintendent of police investigate the character of the applicant, and that the special police wear a "suitable badge." The officers were also required to abide by rules and regulations made by the superintendent of police. *Id.* at 625.

In finding that the ordinance delegated a public function to the officers, the court held "this ordinance delegates police powers otherwise exclusively reserved to the state, thus making those who act pursuant to it potentially liable under § 1983. In effect, for pleading purposes the [ordinance] made [the special police officers] the *de facto* police on Rush's premises." *Id.* at 630.

In this case, Ms. Brown and the other officers were the *de facto* police at the Casino. The Casino's security police officers had full, statutory power to make arrests, wore badges, carried handcuffs, were authorized by the state to carry firearms,[19] and were required to abide by the rules and regulations of the Michigan State Police.

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19. The Casino argues a competing MGCB regulation did not authorize handguns within the Casino. However, this regulation did not apply to Ms. Brown's duties patrolling the outside grounds of the Casino including the garage and, in her words, "perimeter." In any event, as a result of her PA 330 certification, she was required to undergo firearms training and was authorized by the State to carry a handgun.

The Casino's security police officers, as in *Payton*, worked under the auspices of the Michigan State Police, unlike security guards. The Casino's security police officers underwent background checks and were trained for several weeks by the Michigan State Police at the Police Academy. If a Michigan State Police officer ordered the Casino's security police officers to make an arrest, they would be required to comply with that order.

Petitioners argue the Court should ignore the *Payton* analysis in favor of *Wade v. Byles*, 83 F.3d 902 (7th Cir. 1996), the case they claim conflicts with the Sixth Circuit.[20] In *Wade*, the security guards did not have plenary police powers, were not subject to supervision by any police authority and were not authorized to make arrests throughout the entire facility, but only in the lobby area, and only for trespass. They were characterized as "glorified doormen." *Id.* at 905. In *Payton*, the court stated that the authority in *Wade* was so limited that if a crime occurred in a resident's apartment or stairwell, "the security guards presumably would have had to call the police" to make the arrest. *Payton, Id.* at 630. Here, Ms. Brown's plenary arrest authority extended throughout the entire area of the casino, the parking lot and perimeter and was not limited to trespass violations but rather include all misdemeanors and felonies. Moreover, while in the parking lot and perimeter, she was not prohibited from carrying her handgun.

The Casino and its security police officers were certified under M.C.L § 338.1080 as security police officers, and not, as the Casino's security manager pointed out at trial, security guards. They had the authority, as in *Payton*, granted to them by the State of Michigan and the Michigan State Police to, among other things, arrest without a warrant everywhere in the Casino, something a security guard or private individual cannot do. Ms. Brown abused this

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20. The *Wade* court also did not engage in the pinpoint analysis of the "fair attribution" test that Petitioners argue was not performed by the Sixth Circuit.

authority with impunity. The Petitioners were not required to seek the benefits afforded by M.C.L § 338.1080 to become certified to make arrests. In fact, the Casino and its personnel are no longer certified to make arrests under PA 330. However, once the Casino's security police officers did become certified to make arrests, they should be subject to § 1983 liability when they overstep the bounds the Constitution places on them, just as a police officer would.

Contrary to the statements on page 24 of the Petition, there is no split among the Circuits on the issue of whether a state certified security police officer (and not a security guard) licensed to make an arrest is a state actor. The dearth of cases on this limited issue is underscored by the fact that Petitioners, with the exception of *Wade*, (whose arrest powers were limited to the lobby and for the sole infraction of trespassing), can not point to one case in which a security police officer, licensed by the State with plenary power to make an arrest, and vetted by and subject to state police department authority, was not held to be a state actor. On the other hand, several federal courts have held private security police with arrest authority to be state actors. *See* Section II, B, *supra*.

Similarly, the so-called conflict with Michigan law in *City of Grand Rapids v. Impens*, 327 N.W.2d 278 (1982) is equally fallacious. The entire Sixth Circuit, when it denied Petitioners' motion for rehearing *en banc*, understood the distinction under Michigan law between a security police officer, under M.C.L. § 338.1079(1) who has the same authority to make an arrest that a police officer has, unlike a security guard who does not have any statutory authority to make an arrest but is merely "employed for the purpose of protecting the property and employees of their employer." M.C.L. § 338.1079(2).

Petitioners fail to point out that the "security guards" in *Impens* were in fact traditional store security guards and not licensed security police officers as that term is described in M.C.L. § 338.1079. The security guards in *Impens*, unlike

Ms. Brown and her cohorts, did not have any authority to make an arrest under PA 330 and were simply security guards employed at a Meijers store (a mid-western version of a typical Wal-Mart) for the sole purpose of guarding the property of the store pursuant to M.C.L. § 381.1079(2).

Unlike Ms. Romanski, whom the jury found was arrested, the security guards in *Impens* detained a suspected shoplifter under a shopkeepers privilege and did not make an arrest. This shopkeepers privilege is codified in Michigan at M.C.L. § 600.2917 and specifically provides it is limited to "a library or merchant" and applies only to "goods held for sale in a store" and "library materials."[21]

The Casino was the product of years of legislation, numerous regulations, and memoranda of understanding between the Casino, the Michigan Attorney General and the Michigan State Police. Despite all of this, there is simply no legislation or regulation to support Petitioners' initial proposition that it owned the token, that it was a merchant or that the shopkeepers privilege in *Impens* applied to it. *Impens* simply does not apply to the Casino or to security police officers in Michigan.

Finally, Petitioners' argument that "security guards and their employers in the Sixth Circuit can be subjected to massive constitutional tort liability including prohibitive punitive damage awards that might be unavailable under state law" is unfounded. Ms. Brown was a licensed security police officer and not a security guard. This case applies to nine employers in Michigan, who can avoid § 1983 by

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21. Although the Casino has changed its position in its Petition, it argued up through and including its petition for rehearing *en banc* that there was "probable cause" and the shopkeepers privilege should apply because it still owned the token even though it was paid out to a successful prior bettor who failed to claim it. District Judge Zatkoff, who concluded, under Michigan Law, the token was lost property found by Ms. Romanski, refused to apply the shopkeepers privilege set forth in M.C.L. § 600.2917 because "MotorCity never demonstrated that it was a "merchant" and never demonstrated the token was a "good held for sale."

simply not licensing their employees to arrest as the Casino has since done.

At least two federal courts since *Romanski* have recognized that the Sixth Circuit has not subjected every security guard in the midwest to § 1983 liability. In *Boykins v. VanBuren Township*, 2006 W.L. 305751 (E.D. Mich. Feb. 9, 2006), the District Court dismissed a § 1983 action against two Meijer shopping center security guards finding no state action. In determining the guards were exercising the "shopkeepers privilege" *Boykin* held that *Romanski* was "distinguishable on it facts" because in *Romanski*, Ms. Brown was "licensed under state law as a private security police officer," "carried a badge," "wore handcuffs" and "had authority to effect warrantless arrests."

Similarly, in *Padlo v. VG's Food Center*, 2005 W.L. 3556245 (E.D. Mich., Dec. 29, 2005), the court held that store employees who detained two suspected shoplifters pursuant to the shopkeepers privilege found in M.C.L. § 600.2917 were not state actors and refused to apply *Romanski* for the reason that store employees were not private security police officers.

**B. The Sixth Circuit's Decision Is Correct Because The Plenary Power To Arrest Is An Exclusive Power Reserved To The State**

The police function is "one of the most basic functions of government" and an arrest is "the function most commonly associated with the police." *Foley v. Connelie*, 435 U.S. 291, 297 (1978). "The exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals." *Id.* at 298. Numerous Federal courts have agreed that the plenary power to make an arrest has been a power traditionally reserved to the State alone and those to whom it delegates this authority. *Payton*, 184 F.3d at 630; *Henderson*, 631 F.2d at 1118; *Rojas*, 645 F. Supp. at 858; *Thompson*, 425 F. Supp. at 409-10. *See also United States v. Hoffman*, 498 F.2d

879, 881 (7th Cir. 1973) (holding that private railroad police possessing the same powers as public police officers were state actors). *Screws v. United States*, 325 U.S. 91, 109-10 (1945) (observing that one has the power to arrest only when one is "clothes with the authority of state law") (citation omitted); *Rodriguez v. Smithfield Packing Co., Inc.*, 338 F.3d 348, 355 (4th Cir. 2003). "Underlying all of these cases is the notion that if the state cloaks private individuals with virtually the same power as public police officers, and the private actors allegedly abuse that power to violate a plaintiff's civil rights, that plaintiff's ability to claim relief under § 1983 should be unaffected." *Payton, Id.* at 630. Petitioners were exercising an exclusive state function when they arrested Ms. Romanski.

## III. THE PUNITIVE DAMAGE AWARD IS NOT EXCESSIVE IN LIGHT OF THE PETITIONERS' "PARTICULARLY EGREGIOUS" CONDUCT

This case should not be held pending the decision in *Philip Morris* because the 10-1 ratio suggested by Petitioners is not applicable in this uniquely egregious case. This Court has stated that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *BMW of North America v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

This case, as the district court pointed out, "falls squarely within this exception" (Opinion and order denying motion for new trial, pg. 18). Moreover, unlike *State Farm*, *Gore*, and *Philip Morris*, which involved large compensatory awards to redress state law torts, "where injuries are without a ready monetary value, such as invasions of Constitutional rights unaccompanied by physical injuries or other compensable harm, higher ratios between the compensatory or nominal award and the punitive damage award are to be expected." *Argentine v. United Steel Workers of Am., AFL-CIO, CLC*, 287 F.3d 476, 488 (6th Cir. 2002). Since

"actions seeking vindication of Constitutional rights are more likely to result in only nominal damages, strict proportionality would defeat the ability to award punitive damages at all." *Williams v. Kaufman County*, 352 F.3d 994, 1016 (5th Cir. 2003). Moreover, in § 1983 cases, Congress has not imposed a cap on damages such as the $300,000 cap on punitive damages set forth in Title VII cases. Congress "has not seen fit to impose any recovery caps in cases under § 1983, although it has had ample opportunity to do so." *Swinton v. Potomac Corp.*, 270 F.3d 794, 820 (9th Cir. 2001).

Both the district court and Sixth Circuit thoroughly analyzed the jury's punitive damage award in this case which was tethered to the evidence that the Casino's average daily revenues were $1 million per day.[22] The district court in concluding the Casino acted with "at least indifference to the health or safety of [Ms. Romanski], an elderly woman" found the Petitioners' conduct to be "particularly reprehensible."

The Sixth Circuit described the Petitioners' conduct as "particularly egregious," "inexplicable," and agreed with the district court that a jury could properly "exclaim outrageous." The Sixth Circuit concluded the

> "detention itself and the manner in which it was carried out . . . were so egregious in light of the circumstances that malice naturally comes to mind. What other motivation, a reasonable observer might ask, would cause Brown and her colleagues to detain and interrogate a 72-year old woman in a windowless room over five cents?
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22. The Casino resisted discovery of its daily expenses. Magistrate Judge Pepe denied the Casino's motion for a protective order and ruled that if the Casino did not "open its books" it could not provide evidence of its expenses at trial to offset the $1 million (now $1.2 million), it averages in daily revenues.

> "The fact that the [Petitioners] knew that the Casino's own patrons had not been provided with notice of the slot-walking prohibition only makes the [Petitioners'] conduct more reprehensible." [23] *Romanski*, 428 F.3d at 644.

The Sixth Circuit further found however the

> remarkable abuse of power did not end there. It is undisputed that the Casino revoked Romanski's lunch ticket and, having been ejected, she was not permitted to eat anywhere in the Casino. In other words, the rather inhospitable outside (it was humid and over 90 degrees) was the 72-year old Romanski's only choice for lunch.

*Romanski* at 644. Finally, the Sixth Circuit recognized that the Petitioners would not let Ms. Romanski use the restroom by herself but "callously forced her to endure the indignity of having Brown stand guard outside the stall." [24] *Id.* at 644.

The Supreme Court in granting *certiorari* limited the questions presented in *Phillip Morris* to conduct in State court tort cases "analogous to a crime" and whether a jury could punish for "conduct on non-parties." Petitioners did not raise these issues in the Sixth Circuit. The 10-1 ratio the Petitioners asked the Sixth Circuit to apply is not the issue in *Phillip Morris*. It has no applicability to this § 1983 case which involves conduct personal to Ms. Romanski, which, although not criminal, was outrageous, reprehensible, and egregious.

The Sixth Circuit in closing its discussion of reprehensibility found it

> appropriate to quote the district court again '. . . [T]his case was not about the loss of a five-cent

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23. The Casino has since changed this policy to conform to Michigan law, as instructed by the District Court, that the tokens are "lost or abandoned property and not the property of the Casino."

24. Ms. Romanski testified at trial "I didn't want to come out [of the stall]. Because I was a mess. I was crying and I was shaking."

> token or a nine-dollar meal ticket: it was about [Romanski's] right not to be unreasonably seized [and] unreasonably detained. . . . [Petitioners] acted with at least indifference to the health or safety of [Romanski], an elderly woman.'[25] *Id.* at 645.

The district court judge sat through the trial, and the Sixth Circuit, presumably, read the trial transcript. As the Court stated in *Sherman v. Kasotakis*, 314 F. Supp. 2d 843 (N.D. Iowa 2004), when approving a ratio of 12,500 – 1, "while compensatory damages were difficult to calculate the egregiousness of defendant's conduct was obvious to everyone in the courtroom." *Id.* at 875. This case is not similar to, and should not be held pending *Philip Morris*. After five years, it is finally time to vindicate Ms. Romanski's civil rights.

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25. It should be noted that Ms. Romanski ate a light breakfast early in the morning, anticipating her "all you can eat" lunch buffet. She arrived home sometime after 7:00 p.m. The Casino's attorney, when he deposed Ms. Romanski, asked her "the MotorCity Casino is not in the best section of Detroit, is it?" Ms. Romanski responded "no." The Casino's counsel further asked "And it's kind of built so that it's kind of like an island around, I'll use the term, desolation around it, isn't it?" To which Ms. Romanski responded "I don't know."

## CONCLUSION

The Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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FILED
SEP 11 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-38

IN THE

# Supreme Court of the United States

Detroit Entertainment, L.L.C.,
d/b/a MotorCity Casino, and
Marlene Brown,
*Petitioners*,

v.

Stella Romanski.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

## REPLY BRIEF FOR THE PETITIONERS

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September 11, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

## TABLE OF CONTENTS

TABLE OF CONTENTS ..... i
TABLE OF AUTHORITIES ..... ii
REPLY BRIEF FOR THE PETITIONERS ..... 1
CONCLUSION ..... 10

## TABLE OF AUTHORITIES

### Cases

*American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40 (1991) ..... 2
*Chapman* v. *The Higbee Co.*, 319 F.3d 825 (CA6 2003) (en banc) ..... 2, 3, 4
*City of Grand Rapids* v. *Impens*, 327 N.W.2d 278 (Mich. 1982) ..... 10
*Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978) ..... 9
*Johnson* v. *LaRabida Children's Hosp.*, 372 F.3d 894 (CA7 2004) ..... 10
*Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922 (1982) ..... passim
No. 02-1646, *Higbee Co.* v. *Chapman* ..... 5
No. 05-1256, *Philip Morris USA* v. *Williams* ..... 10
*Payton* v. *Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623 (CA7 1999) ..... 10

### Statutes

42 U.S.C. 1981(a) ..... 5
42 U.S.C. 1983 ..... 1, 3, 4, 5
M.C.L. 1080 ..... 7
M.C.L. 338.1079 ..... 7

### Regulations

Mich. Gam. Control Bd. R. 432.11003 ..... 7
Mich. Gam. Control Bd. R. 432.1212 ..... 8

## REPLY BRIEF FOR THE PETITIONERS

The petition demonstrated that certiorari is warranted to address the Sixth Circuit's holding that an arrest by security officers without probable cause constitutes "state action," giving rise to liability – including for massive punitive damages – under 42 U.S.C. 1983. That holding conflicts with this Court's jurisprudence because it deems irrelevant that the arrest was contrary to state policy. It also conflicts with other courts' holdings that similar arrests are not state action because the arrest power has not traditionally been reserved to the State. *Amicus* briefs attesting to the importance of the questions presented and the conflicts created by the ruling below and settled circuit precedent have been filed by both the State of Michigan and the state's Chamber of Commerce. Because respondent's arguments against review are unpersuasive, certiorari should be granted.[1]

1. Respondent does not seriously dispute that a long and uninterrupted line of Sixth Circuit precedent has abrogated this Court's holding that private conduct does not give rise to liability under 42 U.S.C. 1983 if it arises from "private misuse of a state statute" and "invoke[s] the statute without the grounds to do so." *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 940, 941 (1982). In those circumstances, this Court has held, even private conduct undertaken by a "state *actor*" (because of its relationship to governmental roles or policies) may not constitute "state *action*" if it is not "caused by the

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[1] The questions presented are not only important to state action determinations nationwide, but they arise in a significant factual context. As the State explains in its *amicus* brief, numerous large facilities have participated in Michigan's "P.A. 330" program, alleviating the burden on police. Respondent's argument that only nine businesses remain in the program (BIO 7) ignores both their considerable size and that others have withdrawn as a result of the ruling in this case. As respondent explained, program participants who wish to avoid the prospect of massive punitive liability have only one option: to "not licens[e] their employees." BIO 24.

exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.* at 937.

The Sixth Circuit's contrary test for finding state action is clear. That court has repeatedly held – including in an en banc decision – that private conduct amounts to "state action" if it satisfies any of the "three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test." *Chapman* v. *The Higbee Co.*, 319 F.3d 825, 833 (2003) (en banc). See generally Pet. 12-15 (citing numerous appellate and district court rulings applying the circuit's precedent). As the petition explained, that rule looks only to the second of the two parts to this Court's state action inquiry. The Sixth Circuit's test leaves no room for the first, critical inquiry into whether the private party was (a) implementing a state policy or instead (b) violating state policy. See *Lugar*, *supra*; *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 50 (1991) (reiterating, with emphasis in original, that "*both*" elements of the test must be satisfied).

Respondent does not seriously dispute that the Sixth Circuit's well-established rule was the basis for its holding in this case that petitioner Brown (a private party) engaged in state action by arresting respondent in circumstances expressly forbidden by state law – *i.e.*, without probable cause. To the contrary, the brief in opposition in important respects reinforces the petition's showing that the ruling below squarely conflicts with this Court's precedents. Respondent thus argues: "It is clear * * * that the court determined that Petitioners were 'exercising a right or privilege created by the state,' when it concluded that 'Brown ha[d] the authority to arrest a person without a warrant as set forth for public police officers . . . .' M.C.L. § 338.1080, *Romanski*, 428 F.3d at 638." BIO 12. That is *precisely* petitioners' point: the court of appeals found state action on the ground that Brown exercised the arrest authority, notwithstanding that the arrest was in *violation* of that authority, which state law limits to circumstances in

which there is probable cause to believe a crime has been committed. Respondent reinforces that point, explaining: "[Petitioner Brown] unquestionably used this statutory authority to arrest Ms. Romanski pursuant to a Casino policy *that violated Michigan law.*" *Id.* 16 (emphasis added). According to respondent, "Ms. Brown abused this authority with impunity." *Id.* 21-22. It is difficult to imagine a case in which the plaintiff's claim is more starkly that Section 1983 liability attaches when private parties are "acting contrary to the relevant policy articulated by the State" (*Lugar*, 457 U.S. at 940), which is of course precisely the proposition this Court rejected in *Lugar*.[2]

2. Respondent's direct answers to the petition's showing that this case presents an important opportunity to correct the Sixth Circuit's consistent departure from this Court's precedents are not substantial. First, she contends that petitioners waived this argument. The petition fully anticipated that assertion, however. As respondent acknowledges, this Court has jurisdiction if the question presented was either pressed in or passed upon by the court of appeals. See Pet. 18 n.5; BIO 10. Here, both of those elements are satisfied. Unquestionably, petitioners' principal argument below was that petitioner Brown's conduct did not amount to state action. In addition, the court of appeals rested its ruling that petitioners engaged in state action on its precedent (including the en banc decision in *Chapman*) holding that Section 1983 liability attaches whenever the defendant's conduct satisfies any of the three tests for identifying a state actor. See *id.* 16-18; Pet. App. 9a.

Obviously, this Court could decline to exercise its jurisdiction, and respondent hopes to suggest that it would be inequitable for the Court to take up this question in this case because petitioners supposedly are contradicting their argu-

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[2] Respondent's proper remedy is thus in the state law of false arrest, a claim on which she prevailed. Respondent frankly concedes that she pursued a Section 1983 claim because she otherwise would have been forbidden from securing punitive damages. BIO 9 n.11.

ment in the lower courts that the arrest was conducted with probable cause. See BIO 10-12. That is a non sequitur. There is nothing inconsistent in the contention that respondent's Section 1983 claim must fail as a matter of law for the dual reasons that (a) if she was in fact arrested without probable cause there was no "state action," or (b) if she was arrested with probable cause she has no claim on the merits. If Sixth Circuit precedent permitted petitioners to make the first of those arguments, they obviously would have done so. But respondent does not dispute that an uninterrupted line of circuit precedent precluded petitioners from seeking dismissal on the ground that respondent's theory is that petitioner Brown violated the state law basis for her authority to arrest. Such an argument is irrelevant in the Sixth Circuit and to press it would have been futile or even sanctionable.

Second, respondent makes a half-hearted attempt to contend that the Sixth Circuit has not abrogated the first prong of the *Lugar* inquiry. She contends that "in 32 of 36 cases, or 88% of the time, the courts in the Sixth Circuit summarily dismiss § 1983 claims for lack of state action." BIO 10. This argument is similarly a non sequitur. It does not cast any doubt upon the petition's showing that the Sixth Circuit's precedents deem irrelevant that the conduct underlying the plaintiff's suit is contrary to state policy. Respondent's math indicates at most that the Sixth Circuit's rule encourages the filing of frivolous Section 1983 suits. Nor is there anything "summary" about many of the decisions in question, which involve considerable expense to the defendants who are subject to meritless suits. To the extent that respondent hopes to suggest that the question presented arises rarely, that assertion is belied by this case and the en banc decision in *Chapman* (which remanded for further proceedings without regard to whether the conduct underlying the suit was consistent with state policy), by the other pending suits against petitioner MotorCity Casino (including a putative class action) involving very similar claims, and by the many decisions in other courts

of appeals dismissing claims based on the first prong of the *Lugar* inquiry. See Pet. 11, 14; Pet. App. 17a n.4.[3]

3. Respondent nonetheless asserts that review is not warranted because a security officer such as petitioner Brown is "trained, supervised, regulated, disciplined and subject to the control of the Michigan State Police" (BIO 1; see also *id.*) and is "a 'police officer' at the Casino" (*id.* 15). On this view, because petitioner Brown was not merely exercising a "public function" but instead was engaged in "joint action" with the police, the first prong of the *Lugar* standard is inapplicable. Although respondent's factual assertions are false (see *infra* at 7-9) – which is no doubt why the brief in opposition is almost entirely devoid of citations to the record or the governing statutes and regulations – the most important point for present purposes is that they are irrelevant as a matter of law.

The district court took the "state action" question away from the jury based on a single undisputed fact: that Michigan law authorized petitioner Brown to make an arrest in the same circumstances as a police officer. See Pet. 5-6. The court of appeals affirmed on that same ground. See *id.* 6-7. The sole legal theory of both the district court and the court of appeals was that Brown was exercising a "public function." See Pet. App. 10a-17a; *id.* 10a. And as noted, those courts held that petitioners were liable under Section 1983 without regard to whether Brown's conduct was consistent with, or instead contrary to, state law.

Given the procedural posture of the case, in which the district court precluded petitioners from putting the state action question before the jury, all the disputed facts regarding state law are necessarily construed in petitioners' favor. Accord Pet. App. 10a (explaining that because "the district court

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[3] Respondent contends that this Court denied certiorari on the Question Presented in No. 02-1646, *Higbee Co.* v. *Chapman*. In fact, the Question Presented in *Higbee Co.* was: "Whether the 'full and equal benefit' clause of 42 U.S.C. 1981(a) applies to the conduct of private entities that are not acting under color of state law."

took the state action issue out of the case, granting in effect judgment as a matter of law to Romanski on that issue," the Sixth Circuit would "review the state action aspect of the district court's decision *de novo* and view all facts in the light most favorable to Defendants").

The case thus comes to this Court on precisely the ground that the court of appeals decided it: notwithstanding that the arrest was (the lower courts concluded) conducted without probable cause, Brown's conduct constituted "state action" because she was exercising a public function. That holding flies squarely in the face of this Court's state action precedents. Because the Sixth Circuit's departure from this Court's jurisprudence is embodied in an uninterrupted line of decisions and (as the *amicus* briefs establish) the question is of great importance, there is no basis for avoiding review.

Respondent's factual claims thus establish at most that she is entitled to a trial on remand on her alternative "state action" theories. This Court need not now decide whether respondent is correct in her assertions that security police officers and the police engage in "joint action," with the asserted consequence that the first prong of the *Lugar* inquiry is inapplicable. That question does not arise here because that theory was not subject to trial and was not the basis for the district court's ruling or the court of appeals' affirmance.[4]

4. In any event, respondent's new factual claims are contrary to fact and the governing statutory scheme and necessar-

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[4] Petitioners pause to note the troubling consequence if a respondent were able to avoid review on a fact-bound ground not accepted by either of the lower courts. Respondents regularly hope to suggest that this Court will conclude that various factual claims *might* turn out to be true, rendering the case a poor vehicle to decide the questions presented. If that tactic were to succeed, certiorari could be defeated in innumerable important cases meriting this Court's review. But in any event, that dilemma does not even arise in this case given its procedural posture.

ily unsupported by the record. Four of the principal "facts" on which respondent relies are invented from whole cloth:

a. Respondent's assertion that "Brown and the Casino's security police officers are subject to the control of the Michigan State Police," BIO 7, is false. The police have *no* disciplinary authority over security police officers and *cannot* direct their activities. The relationship between the police and security police officers is spelled out in two statutory provisions, which create a simple "licensing" scheme and neither of which gives the police any role in the control of the security officers' conduct. See M.C.L. 338.1079, .1080.[5]

b. Respondent's assertion that Brown was under a duty "to 'report everything we do' to the Michigan State Police," BIO 3, is also false. None of the day-to-day responsibilities are supervised by the Michigan State Police or any other police agency, and the overwhelming majority of the daily actions of Casino security personnel – easily 99% – are not reported to the police. The quotation invoked by respondent relates to a narrow and targeted rule requiring the Casino to report the physical detention of patrons suspected of criminal activity – certainly not a common event at the Casino. See Mich. Gam. Control Bd. R. 432.11003. The very next sentence of the testimony in question, which respondent omits, thus explains that any such obligation is limited to when "you move somebody, detain them, [and] apprehend them" – *i.e.*, to arrests. 7/16/2003 Trans. 102. But that reporting obligation applies equally to *any* arrest by a private party.

c. Respondent's assertion that "Brown, and the other licensed security police officers underwent several weeks of

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[5] Respondent's claim is accurate in only one very limited sense: the Casino believes that it "would be required to make an arrest if the Michigan State Police instructed [it] to do so." BIO 7-8. But that "requirement" is not embodied in any statute or regulation; it is simply the Casino's sense of its obligations to cooperate with the police. Equally important, regular security guards would similarly be obliged to detain an individual at the direction of the police.

rigorous training by the Michigan State Police at the Police Academy in Detroit, Michigan," BIO 6; see also *id.* 7, 14, 19, 21, is false. As petitioner's counsel have re-confirmed with the State Police, such training never occurred. As Brown testified, she was trained by a local community college on its property; uniformed police officers participated only in an orientation session. A police training facility is located at the same college, but she was not trained (nor are security police officers as a rule) at that facility.

d. Respondent also asserts that Brown "is permitted to carry a handgun while on duty." BIO 6, 15. That is false. As Brown testified at trial (7/16/03 Trans. 148), governing regulations squarely prohibit her and other private parties from carrying a gun, see Pet. 5 (citing Mich. Gam. Control Bd. R. 432.1212). Respondent eventually acknowledges that fact, and is left to assert that (although she never did) Brown *could have* carried a firearm in the parking lot. BIO 20 n.19. Respondent would thus have this Court analyze this case on the dubious premise that the Casino could hire employees to distribute guns to guards as they came outside to inspect the parking area and retrieve the guns as they returned.

Two other non-record "facts" on which respondent relies are calculated exaggerations:

a. Respondent asserts that "the Michigan State Police maintains an office and officer at the Casino. The Detroit Police Department and [Michigan Gaming Control Board] also have offices and an officer at the Casino, 24 hours per day, 7 days a week." BIO 7. In fact, the Detroit Police have no such office; that claim is pure invention. Although the Board does have an office at the Casino (which the State Police also has use of), it does not always staff the office around the clock, while the State Police do not even staff the office on a consistent basis. But even the mere existence of that office – to which Casino officials have no access – illustrates the *difference* between the police and the Casino's own security officers.

b. Respondent's assertion that the background check applied to Brown was "similar to that of a police officer," BIO 14, is a substantial exaggeration. Respondent acknowledges that a security police officer is merely "obligated to meet minimum requirements related to age, security or law enforcement experience, and an absence of felony and certain misdemeanor convictions" (*ibid.*).

For all of the foregoing reasons, this case is an ideal vehicle in which to correct the Sixth Circuit's ongoing failure to adhere to this Court's holding that private conduct is not actionable "state action" if it is contrary to the underlying state policy in question.[6]

5. Certiorari is also warranted to resolve the conflict between the decision below and rulings of other circuits and highest state courts over whether the arrest power renders private security officers "state actors." This Court previously reserved judgment on that question (*Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 163 n.14 (1978)), which unquestionably is an important and recurring one on which the states and lower courts would benefit from this Court's guidance. See generally Michigan *Amicus* Br. (explaining that numerous states have similar statutory schemes). The root of the conflict is the view of other courts that the arrest power is not a public function because it has not traditionally been reserved to the states. See generally Pet. 19-24.

Respondent's contrary argument rests principally on her factual claims about the nature of security police officers under Michigan law. As just described, those assertions are both irrelevant as a matter of law in the procedural posture of the case and contrary to the statutory scheme and record.

As the case comes to this Court, the conflict with decisions of the Seventh Circuit is particularly stark. That court

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[6] Petitioners will not belabor respondent's hyperbolic factual assertions regarding the substance of her detention. It suffices to note that the jury found that she suffered $279.05 in actual damages.

holds that private security officers are "state actors" only "where the state had delegated its entire police power to a private police force." *Johnson* v. *LaRabida Children's Hosp.*, 372 F.3d 894, 897-98 (2004). See also *Payton* v. *Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623, 630 (CA7 1999). It has twice rejected claims that officers similar to Brown were state actors, and approved a state action finding only when there was "no legal difference" between the guard and a "regular Chicago police officer." *Id.* at 630. See generally Pet. 22-24. As the State explains, the powers of security police officers in Michigan are much more circumscribed and are analogous instead to the powers of ordinary citizens.

Nor can this case be fairly distinguished from *City of Grand Rapids* v. *Impens*, 327 N.W.2d 278 (Mich. 1982). Respondent no longer defends the court of appeals' attempt to distinguish *Impens* on the inaccurate ground that the plaintiff had not been sufficiently detained in that case, see Pet. 21 & n.6; Pet App. 13a n.2, relying instead on the fact that the guards in *Impens* were not "private security officers," see BIO 22-23. But the court of appeals did *not* rely on that distinction because it was not relevant to its holding that the "arrest" power gives rise to state action. As described by the State, that power is not limited to private security officers.[7]

## CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

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[7] For the reasons described in the petition, if this Court does not review the court of appeals' decision, the case should be held pending the disposition of No. 05-1256, *Philip Morris USA* v. *Williams*, which – like this case – involves a very high ratio of compensatory to punitive damages based on the supposed outrageousness of the defendant's conduct.

Respectfully submitted,

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September 11, 2006

MOTION FILED

SEP 5 - 2006

(3)

No. 06-38

In The
# Supreme Court of the United States

DETROIT ENTERTAINMENT, L.L.C., d/b/a MOTORCITY CASINO, and MARLENE BROWN,

*Petitioners,*

v.

STELLA ROMANSKI,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF AMICI CURIAE GREEKTOWN CASINO, L.L.C., MGM GRAND DETROIT, L.L.C. AND MICHIGAN CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER SEEKING WRIT OF CERTIORARI

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## MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Amici have requested the consent of all parties to file this brief and consent was withheld by the attorneys for Respondent Romanski. Amici submit that they have demonstrated sufficient interest in this matter and the ability to bring to this Court's attention the unique perspective of the overall business community in Michigan. Accordingly, Amici respectfully request that their Motion be granted and this Brief in Support be accepted for filing with this Honorable Court.

Respectfully submitted,

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# TABLE OF AUTHORITIES

Page

CASES

*City of Grand Rapids v. Impens*, 327 N.W.2d 278 (Mich. 1982) ..... 1

*Douglas Moore v. Detroit Entertainment, et al.*, Wayne County Circuit Court Case No. 04-424554-NO (2004) ..... 2

*Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) ..... 1, 4

OTHER AUTHORITY

42 U.S.C. § 1983 ..... 1

## STATEMENT OF INTEREST OF AMICI CURIAE AND IN SUPPORT OF PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

The issue presented by this case is whether a private security guard who possesses limited arrest authority, and purportedly arrests someone outside of those limits, *i.e.*, without probable cause, is a "state actor" potentially liable for constitutional injuries under 42 U.S.C. § 1983. The Sixth Circuit Court of Appeals has erroneously concluded that even absent evidence of any connection or relation to the State, private parties may be held constitutionally liable for their security guard's conduct on their private premises. This holding is directly contrary to several other Circuits, the Michigan Supreme Court (*City of Grand Rapids v. Impens*, 327 N.W.2d 278 (Mich. 1982)) and this Honorable Court's holding in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). The Sixth Circuit's flawed decision has extraordinary implications for Amici and, indeed, all business entities who employ or hire persons for security purposes. Various businesses have already withdrawn their PA 330 certification, and others are considering doing so in light of the Sixth Circuit's opinion, which necessarily places a significantly greater burden on local law enforcement. Amici strongly support the position of Petitioners herein and concur in their request for review by this Court.

Two of the Amici submitting this brief are casinos who, like petitioner, employ close to 3,000 people and average approximately 15,000 patrons daily. All three casinos employ security personnel to ensure the safety and orderly operation of their privately owned enterprises. The

question before this Court is of exceptional importance to Amici and the numerous private businesses throughout the State that utilize security personnel to protect their assets or the safety of their patrons.[1] Moreover, the Sixth Circuit's ruling is clearly not limited to casinos but to all businesses, including retail, grocery, hospitals and health clinics, malls, bars and restaurants, movie theaters, among others, who regularly employ (and need) security personnel, and are now subject to potential liability for constitutional violations if they choose to protect their private enterprises. Amici are extremely concerned that should the Sixth Circuit's decision be permitted to stand, every contact by their security guards with their patrons could be construed as "state action" and, thus, render them potentially liable for constitutional and punitive damages. The consequences of being deemed a state actor can be economically catastrophic; the punitive damages sanctioned by the Sixth Circuit here were 2150 times the actual compensatory damages. This is a clear attempt by Plaintiff and other interested parties to federalize state law torts in hope of qualifying for massive punitive damages, such as the case before this Court. Indeed, several other cases have already been filed and/or are pending asserting these very same claims (often by the same plaintiffs' attorneys). *See, e.g., Douglas Moore v. Detroit Entertainment, et al.,* Wayne County Circuit Court Case

[1] The third Amici submitting this brief is the Michigan Chamber of Commerce (the "Chamber"). The Chamber is a non-profit membership corporation that represents the interests and views of its over 7,000 members, who are Michigan private corporations and businesses engaged in civic, professional, commercial, industrial, agricultural and recreational enterprises, many of whom regularly employ security guards and are thus directly impacted by the Sixth Circuit's decision.

No. 04-424554-NO (2004) (Judge Callahan, believing he was bound by *Romanski*, instructed the jury that the casino was a state actor as a matter of law; jury awarded $525,000, $400,000 of which was punitive damages in case involving a patron who was detained for assaulting a security guard who had denied the patron entry to the casino because the security officer believed the patron was intoxicated).

It is preposterous, both legally and practically, that a private enterprise can be held liable as a state actor for a constitutional tort as a consequence of detaining someone who it believes engaged in theft or other criminal activity on its private premises. It makes even less sense to conclude that a private party who arrests someone without probable cause (and thus its conduct is obviously not sanctioned by the State) can be deemed a state actor. The Sixth Circuit nonetheless opines that simply because a security guard purportedly engages in conduct traditionally deemed a state function, which in this case includes even a limited arrest power, they are *ipso facto* state actors and liable for constitutional harm, regardless of the fact that the State never directed the security personnel to act, assets of the State were not at issue, and the Plaintiff even alleged there was no probable cause for an arrest, which is required under state law. Security guards in private businesses, particularly large ones, with the degree of daily traffic at issue here, must be allowed to have contact and communications with patrons on a regular basis throughout the day in order to do their job. The Sixth Circuit's decision could arguably "federalize" each and every one of these contacts. This opinion is not only nonsensical, it blatantly ignores the requirement set forth

by this Court in *Lugar, supra*, that the "state action" be *"fairly attributable to the state."* 457 U.S. at 937 (emphasis added). The Sixth Circuit's opinion ignored this prerequisite altogether in its analysis.

Per this ruling, therefore, a private entity must choose whether to risk substantial liability every time it detains or questions a person as a result of conduct observed at its private place of business or risk the consequences of having no security whatsoever. Congress could not possibly have intended to impose constitutional liability on private citizens under these circumstances. Moreover, the Michigan Legislature clearly enacted PA 330, the statutory provision under which the security guards here at issue were licensed, to encourage private security in an attempt to reduce the burdens on local law enforcement agencies, particularly in large metropolitan areas which are already over extended. Not one of the Detroit casinos currently maintains this certification because of the fear of potential liability and, thus, consequently the burden on city and state police departments has correspondingly been increased. This decision by the Sixth Circuit is thus both bad law and policy. Amici accordingly request that this Honorable Court grant Petitioners' Application for a *writ of certiorari* and reverse the Sixth Circuit Court of Appeals' erroneous decision.

Amici have requested the consent of all parties to file this brief and consent was withheld by the attorneys for Respondent Romanski. Amici submit that they have demonstrated sufficient interest in this matter and the ability to bring to this Court's attention the unique perspective of the overall business community in Michigan.

Accordingly, Amici respectfully request that their Motion be granted and this Brief in Support be accepted for filing with this Honorable Court.

Respectfully submitted,

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(5)

No. 06-38

Supreme Court, U.S.
FILED
SEP 8 - 2006
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**In the**
**Supreme Court of the United States**

Detroit Entertainment, LLC,
d/b/a Motor City Casino, and
Marlene Brown,

*Petitioners,*

v

Stella Romanski.

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

# BRIEF OF THE STATE OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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## QUESTION PRESENTED

I. When a State delegates to a private person a function that is traditionally reserved exclusively to the State, the private person is deemed a public actor for purposes of 42 USC 1983 actions. Here, the State of Michigan licenses private security officers to enable the officers to make misdemeanor arrests committed in their presence – a right that is similar to the shopkeeper's privilege, which allows a merchant to arrest for misdemeanor retail frauds that occur in the merchant's store. Where the common law and statutory law also allow citizens to arrest for felonies, did the Sixth Circuit Court of Appeals err in concluding that the State's licensure transformed private security officers into State police officers under Section 1983?

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

INTEREST OF THE AMICUS CURIAE ..... 1

REASONS FOR GRANTING THE PETITION ..... 3

I. The licensing of a private security officer, providing that officer authority to arrest for misdemeanors, does not make that private person a "state actor." ..... 3

A. Public Act 330 merely confers the same basic authority to arrest as already exists for the merchant under the common law and Michigan statutory law. ..... 3

B. The Sixth Circuit Court of Appeals failed to recognize that the limited authority to arrest conferred on these private employers was not a right that was historically reserved exclusively to the State. ..... 7

II. The Court of Appeals' decision concluding that private security officers are subject to Section 1983 actions has undermined Public Act 330 because private employers will be discouraged from licensing its employees through this Act and, consequently, local police agencies will have to regulate these facilities. ..... 9

CONCLUSION ..... 11

## TABLE OF AUTHORITIES

Cases

*City of Grand Rapids v Impens,*
414 Mich 667; 327 NW2d 278 (1982) ..... 6

*Flagg Bros. v Brooks,*
436 US 149 (1978) ..... 7

*Jackson v Metropolitan Edison Co,*
419 US 345 (1974) ..... 7

*Maliniemi v Gronlund,*
92 Mich 222; 52 NW 627 (1892) ..... 4

*People v Couch,*
436 Mich 414; 461 NW2d 683 (1990) ..... 8

*People v McLean,*
68 Mich App 480; 36 NW2d 231 (1976) ..... 4

*Romanski v Detroit Entertainment,*
428 F3d 629 (2005) ..... 1, 7, 8

Statutes

22 Okl St § 1343 ..... 5

42 USC 1983 ..... 2, 7, 9

720 Ill Comp Stat Ann § 16-A-5 ..... 5

Ala Code § 15-10-14 ..... 5

Ariz Rev Stat Ann § 13-1805(C)-(D) ..... 5

Ark Code Ann §§ 5-36-116(a) ..... 5

Cal Penal Code § 490.5(f) ..... 5

Conn Gen Stat Ann § 53a-119a ..... 5

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Kan Stat Ann § 21-3424(c) ..... 5

Ky Rev Stat Ann § 433.236 ..... 5

La Code Crim Proc, art 215 ..... 5

MCL 338.1051 *et seq* (Public Act 330) ..... passim

MCL 338.1080 ..... 3, 9

MCL 338.1081 ..... 9

MCL 600.2917 ..... 5

MCL 750.356 ..... 5

MCL 764.15 ..... 3, 4

MCL 764.16 ..... 4

Me Rev Stat Ann § 3521 ..... 5

Nev Rev Stat § 597.850(3) ..... 5

NM Stat Ann § 30-16-23 ..... 5

Or Rev Stat § 131.655 ..... 5

RI Gen Laws § 11-41-21 ..... 5

Tenn Code Ann § 40-7-116 ..... 5

Utah Code Ann § 77-7-12 ..... 5

Va Code Ann § 18.2-105.1 ..... 5

W Va Code § 61-3A-4 ..... 5

Wis Stat § 943.50(3) ..... 5

Other Authorities

5 Am Jur 2d Arrest § 57 ..... 4, 8

5 Am Jur 2d Arrest § 58 ..... 4

5 Am Jur 2d Arrest § 59 ..... 4, 10

## INTEREST OF THE AMICUS CURIAE

The Attorney General of Michigan serves as the chief law enforcement officer for the State and, under Michigan law, has authority to appear in cases to vindicate the interests of the people of the State. The Sixth Circuit Court of Appeals decision in *Romanski v Detroit Entertainment* has undermined the value of the licensing scheme established by the Michigan Legislature for private security officers hired by private employers, a decision that will have an adverse effect for the safety of hospitals and schools in Michigan in addition to casinos, and will increase the burden on local police agencies to protect the safety of our citizens.[1] Consequently, the Michigan Gaming Control Board has asked the Attorney General to file an amicus brief. The Attorney General has been in contact with private employers on this subject, including schools and malls, about the chilling effect this decision may have on the use of the licensure provisions, thereby inhibiting the ability of private employers to guarantee the safety of people within their facilities.

In the licensure provisions of MCL 338.1051 *et seq* ("Public Act 330"), the State of Michigan affords a private employer – hospitals, schools, malls, and casinos – the opportunity to hire private security officers and license them so that the security personnel will have the right to arrest without a warrant while on the employer's premises. For example, one of the largest hospitals in Grand Rapids, Spectrum Health, has licensed private security officers under Public Act 330. The authority conferred by Public Act 330 is the same basic right as is provided in the common law shopkeeper's privilege, but applied to other private employers that are not merchants. By statute and at common law, the right to arrest is a right that has been shared by police officers and civilians. It is not an exclusive power reserved to public actors.

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[1] *Romanski v Detroit Entertainment*, 428 F3d 629 (2005).

By concluding that this licensure provision transforms these private security officers into "State actors" subject to punitive damages under 42 USC 1983, the Sixth Circuit overlooked the fact that the Michigan statute is merely conferring the same basic limited authority on private citizens as is provided by the shopkeeper's privilege. This decision may well negate the practical value of the licensure provision, because private employers will not avail themselves of the provision since they will not wish to subject themselves to punitive damages in Section 1983 actions. Consequently, the burden on policing this kind of crime in hospitals, schools, malls, sports facilities, transportation facilities, and, in this case, casinos, will then fall onto an already overburdened local police agency. This Court should grant the petition for certiorari.

## REASONS FOR GRANTING THE PETITION

### I. The licensing of a private security officer, providing that officer authority to arrest for misdemeanors, does not make that private person a "state actor."

#### A. Public Act 330 merely confers the same basic authority to arrest as already exists for the merchant under the common law and Michigan statutory law.

The Michigan Legislature enacted the Private Security Business and Security Act in 1968 (known as "Public Act 330") to regulate private security personnel for the safety of the general public.[2] The primary provision of this Act for arrest powers is the provision that grants licensed private security police officers the same authority to arrest as public police officers, namely the authority to arrest for misdemeanors[3]:

> A private security police officer, as described in section 29, who is properly licensed under this act has the authority to arrest a person without a warrant as set forth for public peace officers in section 15 of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.15, when that private security police officer is on the employer's premises. Such authority is limited to his or her hours of employment as a private security police officer and does not extend beyond the boundaries of the property of the employer and while the private security police officer is in the full uniform of the employer.

The basic police arrest provision for police officers ("peace officers"), MCL 764.15, lists the different circumstances in

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[2] MCL 338.1051 *et seq.*

[3] MCL 338.1080.

which a police officer may arrest without a warrant; this list includes misdemeanors committed in the officer's presence and also includes certain kinds of misdemeanors where the officer has reasonable cause to arrest but where the crimes were not committed in the officer's presence, e.g., domestic violence.[4]

Public Act 330 only increases the authority of a private security officer to arrest above that of an ordinary citizen in one circumstance – the right to arrest for misdemeanors. This grant of authority is then circumscribed by two conditions: (1) by location – it is limited to the employer's premises; and (2) by time – it is limited by the employee's actual working hours.

This same basic authority to arrest as conferred by Public Act 330 is already granted by common law and by statute to merchants. Under the common law, as codified by Michigan statutory law, all citizens have the right to arrest for a felony either committed in their presence or where that felony was committed outside of their presence.[5] The shopkeeper's common law privilege, moreover, allows a private citizen who is a merchant or the agent of a merchant to detain a person for the theft of merchandize inside the store.[6] In Michigan, under MCL 764.16(d), the merchant or the merchant's agent has the authority to arrest for shoplifting, which includes the authority to arrest for these misdemeanors not committed in the person's presence:

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[4] MCL 764.15.

[5] 5 Am Jur 2d Arrest § 57 (felony committed in citizen's presence); 5 Am Jur 2d Arrest § 58 (felony committed outside of citizen's presence); MCL 764.16(1), (2). See also *Maliniemi v Gronlund*, 92 Mich 222, 227; 52 NW 627 (1892) ("A private person has a right to arrest a man on suspicion of felony without a warrant") and *People v McLean*, 68 Mich App 480, 485-486; 36 NW2d 231 (1976).

[6] See 5 Am Jur 2d Arrest § 59 ("This common law right of a merchant to detain suspected shoplifters is recognized by several jurisdictions").

> If the private person is a merchant, an agent of a merchant, an employee of a merchant, or an independent contractor providing security for a merchant of a store and has reasonable cause to believe that the person to be arrested has violated section 356c [retail fraud first degree] or 356d [retail fraud second degree] of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.356c and 750.356d of the Michigan Compiled Laws, in that store, *regardless of whether the violation was committed in the presence of the private person.* [Emphasis added.]

In other words, Michigan law by statute allows the private security personnel for a merchant the authority to arrest for misdemeanor retail fraud.[7] Other states provide the same basic right of merchants to detain in these circumstances.[8] Corresponding to this authority, the State of Michigan limits liability by excluding punitive damages and damages for mental anguish in a suit for unlawful arrest and false imprisonment for a merchant or agent of a merchant where that person has probable cause to believe that the patron was committing retail fraud.[9]

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[7] Second-degree retail fraud is a misdemeanor in Michigan under MCL 750.356d.

[8] Ala Code § 15-10-14; Ariz Rev Stat Ann § 13-1805(C)-(D); Ark Code Ann §§ 5-36-116(a); Cal. Penal Code § 490.5(f); Conn Gen Stat Ann § 53a-119a; Fla Stat Ann § 812.015(3)-(5); Idaho Code Ann § 48.704; 720 Ill Comp Stat Ann § 16-A-5; Ind Code § 35-33-6-2; Iowa Code Ann § 808.12; Kan Stat Ann § 21-3424(c); Ky ev Stat Ann § 433.236; La Code Crim Proc, art 215; Me Rev Stat Ann § 3521; NM Stat Ann § 30-16-23; Nev Rev Stat § 597.850(3); 22 Okl St § 1343; Or Rev Stat § 131.655; RI Gen Laws § 11-41-21; Tenn Code Ann § 40-7-116; Utah Code Ann § 77-7-12; Va Code Ann § 18.2-105.1; Wis Stat § 943.50(3); W Va Code § 61-3A-4.

[9] MCL 600.2917.

Consistent with this fact, in *City of Grand Rapids v Impens,* the Michigan Supreme Court examined the question whether private security personnel regulated under Public Act 330 were "state actors" who were required to give *Miranda* warnings when they took a person suspected of criminal activity into custody, searched him, and then interrogated him.[10] The Court rejected the contention that this was state action by concluding that the security personnel were not acting as "police agents," but rather that their "role may be viewed as an extension of the common-law shopkeepers' privilege to detain for a reasonable period of time a person suspected of theft or failure to pay."[11] This is right. Public Act 330 merely extends the right of arrest from merchants to private employers who may encounter small level crime that private security officers may most easily address, i.e., expanding the right from merchants to private security in schools, hospitals, and malls.

For these same reasons, the Michigan Supreme Court in *Impens* ultimately concluded that there was no state action in that case[12]:

> Defendant believes that the licensing statutes which regulate private security guards demonstrate the requisite degree of state action to bring their activities under color of state law, subject to constitutional restraints. We disagree. We do not believe that the mere licensing of security guards constitutes sufficient government involvement to require the giving of *Miranda* warnings.

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[10] *City of Grand Rapids v Impens,* 414 Mich 667, 671; 327 NW2d 278 (1982).

[11] *Impens,* 414 Mich at 675.

[12] *Impens,* 414 Mich at 676.

The Court then determined that the security personnel were under no obligation to provide *Miranda* to the person they had placed in custody.

**B. The Sixth Circuit Court of Appeals failed to recognize that the limited authority to arrest conferred on these private emplc 'ers was not a right that was historically reserved exclusively to the State.**

This Court has held that where the State delegates a function that has traditionally been reserved exclusively by the State to a private party, this private party is deemed a state actor.[13] This Court has not previously determined whether a private security officer licensed to make misdemeanor arrests is state actor when acting on this authority.

In *Romanski,* in examining whether private security officers were state actors under 42 USC 1983, the Court of Appeals determined that private security officers were serving a "public function" by exercising powers that were traditionally reserved to the State.[14] In reviewing the case law, the Court of Appeals then concluded that Petitioner Gloria Brown was a "state actor as a matter of law" because she exercised "plenary" police power since she was authorized to make arrests at her discretion and for any offense.[15] But a citizen has always had the authority at common law – and supplemented by Michigan

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[13] See *Flagg Bros. v Brooks,* 436 US 149, 157-158 (1978); *Jackson v Metropolitan Edison Co,* 419 US 345, 352-353 (1974).

[14] *Romanski,* 428 F3d at 636.

[15] *Romanski,* 428 F3d 629.

statutory law – to arrest at that citizen's discretion for any felony offense.[16]

The Court of Appeals ruled that the private security officers here were "de facto police officers." This is not true.

The authority to arrest for misdemeanors committed in one's presence is not the cornerstone of state arrest authority. The right to arrest is not reserved exclusively to the State.[17] Moreover, at common law, the law even recognized the authority of civilians to arrest for the "breach of the peace," which would include misdemeanors.[18] In brief, the arrest function has historically been shared between police officers and ordinary citizens.

In this case, the fact that Public Act 330 licensed private security officers and thereby expanded their authority from making felony arrests to also making misdemeanor arrests committed in their presence did not make these private security personnel State actors. They were given the same basic authority to arrest as has been conferred on merchants and their agents. This is not an exclusive public function.

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[16] In fact, the Michigan Supreme Court has recognized the superior authority of a civilian to use lethal force to stop a fleeing felon than a police officer, because the civilian is not constrained by the Fourth Amendment. *People v Couch*, 436 Mich 414, 417; 461 NW2d 683 (1990) (affirming the common law rule that a citizen has the authority to use lethal force to stop a nondangerous fleeing felon).

[17] See *Romanski*, 428 F3d at 651 (Farris, dissenting)("Romanski has presented no evidence that the State of Michigan has traditionally and exclusively reserved the power to make warrantless arrests. To the contrary, the Michigan Supreme Court has held that licensed private security guards do not act as state actors in detaining shoplifting suspects").

[18] 5 Am Jur 2d Arrest § 57.

**II. The Court of Appeals' decision concluding that private security officers are subject to Section 1983 actions has undermined Public Act 330 because private employers will be discouraged from licensing its employees through this Act and, consequently, local police agencies will have to regulate these facilities.**

Currently, the private employers who have licensed private security officers under PA 330 include hospitals, schools, and malls. The fact that the licensing scheme will now subject the private employer to punitive damages under 42 USC 1983 actions will discourage these employers from exercising their statutory right to make arrests under MCL 338.1080. As a concrete example of this point, in the aftermath of this ruling, several employers, including the Motor City Casino and MGM Grand Detroit Casino, both in Detroit, no longer certify their security officers for arrest powers through Public Act 330 for fear of liability under Section 1983. And three of the largest health care facilities in the State – Detroit Medical Center, Henry Ford Hospital, and St. John Hospital & Medical Center – maintain licensed security officers under Public Act 330.

Contrary to the legislative intent underlying Public Act 330, the *Romanski* decision may have the ironic effect of reducing the oversight of Michigan State Police and other State agencies over private security personnel and may also reduce the safety of these facilities. The private employers may decide to forgo the burden of using the licensing provision – with its requirement of training and other oversight obligation under MCL 338.1081 – and elect to merely rely on their statutory and common law right to arrest offenders.

Moreover, because the majority of the private employers who license under Public Act 330 are located in Detroit, the lion's share of the burden of policing these facilities will fall to the City of Detroit Police Department and the Michigan State Police. The *Romanski* decision comes at a time when the Michigan economy has been sluggish, and local police agencies have seen reductions in personnel. In fact, the Michigan Commission on Law Enforcement Standards reported in July 2006 that the number of local police officers statewide had reduced from 23,150 in 2001 to 21,681 officers, a reduction of more than 1400 officers statewide. The responsibility for responding to misdemeanor criminal activity in the casinos and in hospitals, schools, and malls will become or remain the obligation of the Detroit Police Department or some other overburdened local police agency.

Given the limited resources available to local police agencies, the public is better served by allowing well-trained private security officers on hand with misdemeanor-arrest powers to respond to this kind of minor crime than by having the local police agency send a police vehicle to every kind of disorderly conduct matter that arises. This power to arrest is not an exclusive police function. The same policy justification underlying Public Act 330 supports the basis for the shopkeeper's privilege – the private security personnel on hand is often in the best position to prevent the criminal from walking away.[19] This Court should grant leave and correct the misguided decision of the Court of Appeals.

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[19] See 5 Am Jur 2d Arrest § 59.

## CONCLUSION

Wherefore, the State of Michigan asks this Court to grant the petition for certiorari.

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Dated: September 2006